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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

HEARINGS

BEFORE THE

SPECIAL COMMITTEE ON INVESTIGATIONS

OF THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

JANUARY 30, 31, 1989 AND FEBRUARY 1, 1989
WASHINGTON, DC

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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

MONDAY, JANUARY 30, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC.

The special committee met, pursuant to notice, at 10:05 a.m. in room 216, Hart Senate Office Building, Hon. Dennis DeConcini (chairman of the special committee) presiding.

Present: Senators DeConcini, Inouye, McCain, and Daschle.

Staff present: Kenneth Ballen, Andrew Klingenstein, James H. Rowe, III, George Brent Mickum, III, Carl Mayer, Gretchen DeMar, and Percy Samuel.

Senator DECONCINI. The Special Committee on Investigations of the Select Committee on Indian Affairs will open its official hearings this morning. Before my opening statement I will yield to the distinguished chairman of the Select Committee on Indian Affairs, the Senator from Hawaii, Mr. Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman.

In the fall of 1987 the Arizona Republic came forward with a series of articles that literally startled the Select Committee on Indian Affairs. We began informal investigations on the allegations set forth but soon realized that the study ahead was too immense for just informal inquiries.

Accordingly the Senate of the United States, on October 23 of 1987, by resolution, authorized the Select Committee on Indian Affairs to establish a special investigating committee to look into these allegations.

I would like to remind one and all what these allegations were.

First, that the Department of the Interior has breached its fiduciary responsibilities as trustee for Indian lands and resources by its failure to adequately manage trust resources.

Second, that Indian resources have been taken from Indian lands under terms of leases without adequate compensation being paid to the Federal Government as trustee for Indian lands.

Third, that the responsibility to provide legal assistance to Indian people and Indian tribal governments for the protection of their rights and resources frequently places the agencies of the Federal Government in a conflict of interest position.

Fourth, that there are fraudulent actions and possible criminal liability associated with the administration of Indian housing programs.

Fifth, that there is a failure to coordinate law enforcement activities among those agencies responsible for the enforcement of laws on Indian reservations.

Sixth, that there is a significant problem of child abuse associated with the provision of educational services to Indian children.

Seventh, that the education programs provided to Indian students do not provide the quality of education available to other United States citizens.

Eighth, that there are obstacles in Federal laws and regulations to the economic development of Indian reservations.

Ninth, that there is no consistent Federal policy to guide the administration of Indian affairs by the agencies of the Federal Government.

And finally, that it has been documented that the status of health of Indian people continues to rank far below that of the rest of the U.S. population.

Accordingly, the Rules Committee recommended and the Senate approved the second-largest appropriation in the history of the Senate for investigation purposes. This should indicate to one and all the important nature of the proceedings which will unfold before us in the days to follow.

I wish to commend the chairman of the Special Committee on Investigations, Senator DeConcini, and members of the Special committee, Senator Daschle and the Cochairman of the Special Committee, Senator McCain from Arizona, for the work that they have done on this matter. It has been a thankless job. It has been time-consuming and I know that it has been most stressful at times.

With that, I once again thank you, Mr. Chairman and members of the Special Committee and your staffs, for the fine job.

Senator DECONCINI. Chairman Inouye, thank you very much.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. For the last 8 months the Senate Special Committee on Investigations has been conducting a comprehensive investigation into all aspects of the Federal Government's relationship with American Indians. The investigation was prompted in large part by a series of articles which appeared in the Arizona Republic newspaper alleging widespread fraud, mismanagement, and corruption.

The distinguished chairman of the Select Committee on Indian Affairs has pointed out the purpose of this proceeding. I want at this time to pay my thanks and appreciation to him and his staff for their support and steadfastness with this very difficult investigation. It has not been easy and I know that he has had many other duties to contend with, along with the issues brought up in this investigation, and I thank him personally for his support and his continued insistence that we continue this investigation in the manner which we are following.

Thanks to the leadership displayed by Cochairman McCain, my colleague from Arizona, our committee has conducted this investigation in an entirely bipartisan fashion. Last spring Cochairman McCain and I assembled one unified, bipartisan staff, including natural resource specialists, accountants, several attorneys, and professional investigators.

The committee staff began by reviewing Congressional reports, Interior Department audits, and investigations that evaluated the various Indian programs under review.

We also began to interview, on a confidential basis, Federal employees, tribal members, and others in the private sector who deal with Indian tribes. Indeed, over the course of the last 8 months our staff conducted over 1,000 interviews by telephone and in person. The staff received briefings and documents from every Federal agency that administers Indian programs.

The committee also sought help and guidance from the tribes. When we first got underway we wrote the tribes to explain the committee's functions and to solicit views on problems confronting the Indian community.

I think we have continued to keep the Indian tribes apprised of our work. In fact, our opening testimony this morning will come from a distinguished panel of Indian leaders from different regions of this country.

After receiving briefings and interviewing witnesses, we entered into a more formal phase of the investigation, the subpoenaing of documents and the deposing of witnesses. We issued nearly 300 subpoenas to individuals, private contractors, and natural resource companies. Additionally, the committee has received and examined more than 900,000 pages of documents. We have also conducted dozens of depositions and will continue to take additional depositions in the future.

The record uncovered by our investigation is not encouraging. Many of the Federal Indian programs are fraught with corruption and fraud. Most of the others are marred by mismanagement, and some by incompetence. We have found evidence of these problems at all levels, from Washington, DC through the bureaucracy and down to the field. But wherever they exist, the results seem to be the same: American Indians and the Nation are being badly served by Federal programs that do not accomplish their goals, and by individuals more interested in lining their pockets than in helping American Indians.

As with other cases of governmental waste and abuse, all American taxpayers end up bearing the burden of these inefficient and ineffective programs. But unlike other, more widely-recognized cases, the abuses discovered by our committee are contributing directly to the impoverishment of one of our Nation's poorest minority groups.

Although the Federal Government spends $3 billion a year on Indian programs, the poverty rate for all American Indian families is two to three times the national average. For those on reservations, the poverty rate is four times the national average. According to the most recent Census Bureau statistics, 16 percent of Indian houses on reservations lack electric lighting; 21 percent lack an indoor toilet, and more than one-half have no telephone.

As our hearings unfold over the next few weeks we must remember that every tax dollar wasted by an incompetent administrator and every tax dollar diverted by a corrupt individual comes directly out of the living standard of an American Indian family. Not only are we wasting taxpayer dollars; we are wasting opportunities for American Indians.

On a personal note let me add that it is not always a pleasant task to try to conduct a vigorous, aggressive, and unbiased investigation. An investigation such as this one wins no friends; instead, at one time or another we have probably alienated all the groups under review during the investigations. Those Federal agencies who are put in a bad light and those Federal employees who have been shown to have engaged in wasteful or fraudulent activities are not going to like us. Certainly the oil and gas companies, who have produced hundreds of thousands of documents and submitted to countless interviews, are not going to be thrilled with us either. Doubtless, they will be even less enamored of the committee when they are subjected to depositions and further inquiries during our later proceedings.

And those in tribal governments who have abused their positions probably wish we simply would go away. We have always believed, however—and I know that Cochairman McCain and Senator Daschle join me in these remarks—that we are obliged to pursue fraud, waste, or corruption wherever it exists, even if it goes to tribal governments. To do less would be to betray the trust placed in us by the U.S. Senate and the American people and, most particularly, the Indians themselves who stand to lose the most by continuation of the status quo.

In our first round of hearings we will focus on the failure of the Federal Government, particularly the Bureau of Indian Affairs, to ensure integrity and accountability in the Federal Government's relationship with American Indians. We will specifically address the Federal Government's role and performance in representing Indians in court; the administration of Indian contracting programs; law enforcement on the reservations; tribal corruption; the infiltration of Indian gaming operations by organized crime; child sexual abuse in Indian schools and elsewhere; and some environmental issues. The committee will hear testimony on these subjects in no particular order of priority because we believe they are serious problems which all need to be addressed.

There may be other problems, perhaps equally compelling, which will be examined in the coming weeks and which may be presented in the committee's later round of hearings. We now expect to address problems in the Indian Health Service, Indian education, HUD Indian housing programs, and the natural resource area during the later round of hearings, along with recommendations for remedying those problems.

One final word about the oil and gas part of the investigation. The Arizona Republic series contained very serious allegations about the diversion of Indian oil royalties. To investigate the merits of these allegations fully, as well as others we developed ourselves, the committee has spent substantial resources in this area of the investigation. Due to the complexity of the task—made infinitely more difficult by the fact that no less than three Federal agencies administer these programs—we have not yet completed our studies of this area. We are pursuing it vigorously.

At this point the media's earlier estimation of billions of dollars in underpayments of royalties appear to be overstated, but other significant issues remain to be reviewed and presented later this year. The complexity of the tripartite Federal bureaucracy—the Interior Department's Bureau of Indian Affairs, the Mineral Management Service, and the Bureau of Land Management—is paralleled only by their Byzantine accounting, auditing, and recordkeeping practices or lack thereof. Such complexity clearly frustrates even industry and certainly overwhelms the Indian mineral resource owners.

After we have conducted the numerous depositions and have examined additional documents necessary to finish the job, we will present our findings in the spring.

Let me now yield to my distinguished colleague from Arizona, the cochairman of this committee, Senator McCain.

[Prepared statement of Senator DeConcini appears in appendix.]

Senator McCain. Thank you, Mr. Chairman. I would like to express my appreciation to you for the very close relationship that we have enjoyed in working together over these many months on this very important committee and on these very important issues. I would also like to extend my appreciation to Chairman Inouye, who has given us the charter—indeed, the latitude—to try to address these issues in the most effective and helpful fashion.

Mr. Chairman, I have a prepared statement which I would like to have made a part of the record.

Senator DeConcini. Without objection, it will appear in the record.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, COCHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator McCain. I would like to make a few remarks.

The Special Committee on Investigations was established during the 100th Congress in response, as you said, Mr. Chairman, to public allegations of fraud and mismanagement of the Federal Government's trust responsibility for Indian people, their lands, and their resources.

I believe that Senator Inouye best described the purpose of this special committee when he stated that,

> I think that we would all agree that those who are charged with the responsibility of administering Indian programs and services, be they Federal instrumentalities, State agencies, or tribal governments, must be accountable; first, to those from whom a trust responsibility has been established, the Indian people, as well as accountable to the Congress and the American people. This accountability must be achieved, and I believe can best be realized, by Indian people working with the Congress and with Federal agencies to identify the need for change and to initiate reform where it may be necessary. The establishment of a Special Committee on Investigations, I believe, will provide us with a capacity to more effectively and expeditiously realize this objective.

Mr. Chairman, as we begin these public hearings I believe it is very important to reflect upon the purpose of the special committee and to bear it in mind as we proceed. In many respects, the work of this committee is a continuation of previous Federal efforts to address the problems which confront Indian people. During this century there have been numerous task forces and commissions established by both the Congress and the President to examine the status of Indian affairs and to make recommendations for improvements. In some instances, these commissions have recommended beneficial reforms; in others, they provide only temporary attention to the issues and then the matter was quickly forgotten.

I would like to take a moment to place the work of this committee in some historic perspective.

Our Constitution confers on the Congress the ultimate authority and the responsibility for the relations between the Federal Government and the tribes. With this authority and responsibility comes the duty to ensure the fulfillment of the trust. These are not passing whims or fancies of the day. They are solemn, legal, and I believe moral, obligations which are deeply embedded in our history as a Nation.

The renowned scholar, Felix Cohen, perhaps said it best:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our political faith.

I believe we will hear from the witnesses this morning that there have been numerous rises and falls of our political faith as regards the moral and constitutional obligation that we have to Native Americans.

The Northwest Ordinance, as we know, was enacted in 1789 with the famous pledge that "the utmost good faith shall always be observed toward Indians." Many of the duties in the first Congress were devoted to work on Indian affairs. Secretary of War Knox believed that this policy was also necessary to distinguish the national character of the new American Government from the previous conduct of the British colonial government toward Indian nations. Secretary Knox stated,

> But, in future, the obligations of policy, humanity, and justice, together with that respect which every nation sacredly owes to its own reputation, unite in requiring a noble, liberal, and disinterested administration of Indian affairs.

Mr. Chairman, for the next 100 years this country became involved in varying policies, up to the 1880s, where the policy of allotment—the allotment era of the 1880s—was adopted. While the acts were intended to promote Indian agriculture and individual ownership, the results were disastrous. Indian land ownership shrank from 138 million acres in 1887 to 52 million acres in 1934. Tribal cultures and traditional governments were severely impacted.

The consequences of the allotment era linger to this day in the form of checkerboard jurisdictions and fractionated land ownership which makes effective government and resource management difficult and, in some cases, impossible. The allotment era ended in 1934 with the enactment of the Indian Reorganization Act, which was intended to revitalize and strengthen tribal governments. Then, in the 1950s in another violent swing, Congress authorized the termination policy which called for the abolition of Federally-recognized tribes. As noted by President Nixon in 1970, the termination policy was disastrous for all tribes. Indians from terminated tribes suffered from worsened economic and social conditions. Tribes which weren't terminated became even more dependent on the Federal Government out of fear of termination.

The self-determination policy which was enacted in 1975 seeks to strengthen tribal governments and reduce Federal domination. It has generally been well received by the tribes, and during the 100th Congress I was proud that the threat of termination was finally removed by the repudiation and repeal of H. Con. Res. 108.

Mr. Chairman, I believe that this history is important. To ignore it is to condemn ourselves and the Indian people to repeating the mistakes of the past. It is also important because it helps us to understand better the current situation in which we find ourselves. We must make certain that the Indian people are receiving the full benefit to be derived from their trust lands and resources as well as the full benefits of programs and services which are intended for their assistance and well-being.

Our goal must be to strengthen and improve the accountability and the capacity of the Federal and tribal governments to provide necessary programs and services effectively and efficiently to the Indian people. I believe that as we exercise our authority and seek to discharge our responsibility, it is important that we avoid the mistakes of the past. It is abundantly clear that the abrupt swings in Federal policy toward Indians have always produced negative results.

I believe that many of the situations which we will examine in these hearings are the result of prior inconsistent Federal policies. Caution and careful deliberation are necessary if we are to formulate effective policies for the efficient administration of the Federal trust responsibility.

Mr. Chairman, as you mentioned in your statement, this investigation by this committee has led us into some areas which we had not anticipated previously, and in my view it has even made a more compelling case, in the 7 years that I have been involved in these issues, that we must not only get the attention of the Congress but of the American people; that indeed, if we are going to be a kinder and gentler Nation, we must go back and address the issues and the afflictions of the native Americans that are so prevalent across Indian country today which, in my view, we should view as a national disgrace and dishonor.

Thank you, Mr. Chairman.

[Prepared statement of Senator McCain appears in appendix.]

Senator DECONCINI. Thank you, Cochairman McCain.

Senator Daschle is delayed due to a flight. We understand that he will be here within the hour.

We are very pleased to have with us a most distinguished group of tribal leaders this morning. The group includes four tribal chairpersons and one Indian leader not in government, and they come virtually from every region of the country where Indians are concentrated. We have selected this group not only for their geographic diversity but also because each one is an independent and highly respected member of the American Indian community.

Also, like this committee itself, the group of tribal leaders is bipartisan in nature. We look forward to hearing the views of these various leaders. Unfortunately, as the panel understands from discussion with our staff, at this time we do not have time to discuss all the issues that they might be wanting to be presented to us. We have invited these leaders—and the invitation will remain open—to appear later during these hearings on other subject matters that they may want to address.

So at this time, if Phillip Martin, Wilma Mankiller, Twila Martin-Kekahbah, and Joe Flett would come forward. We will start with Mr. Phillip Martin.

Mr. Martin has been an important fixture in the Indian community for almost 30 years. As chief of the Mississippi Band of Choctaw Indians for 16 of those years, Chief Martin has won high praise from all quarters as a respected, independent-minded leader who has almost singlehandedly brought economic development to that particular reservation.

Chief Martin has served as the president of several important Indian organizations, such as the National Tribal Chairmen's Association and the United South and Eastern Tribes, which he founded. We are very thankful that Chief Martin was willing and able to extend his already week-long business trip to Washington, DC in order to address the committee.

Mr. Martin, we will listen to your statement at this time.

STATEMENT OF PHILLIP MARTIN, CHIEF, MISSISSIPPI BAND OF CHOCTAW INDIANS, PHILADELPHIA, MS

Mr. MARTIN. Thank you very much, Mr. Chairman. I hope you will bear with me; I have a sore throat and a cold. I caught that over the weekend.

My name is Phillip Martin. I am the elected chief of the Mississippi Band of Choctaw Indians, a tribe of some 5,000 members living in the east-central part of the State of Mississippi.

We have received a great deal of attention because of our economic success over the last 10 years or so.

The Senate is to be commended for authorizing creation of a special committee to investigate Indian affairs. I am honored to be on this panel with these distinguished tribal leaders to express our views to you. I am certain that the findings of the special committee will be useful in changing the approach and methods of BIA and the Indian Health Service in their relationship with tribal governments. I am highly supportive of your efforts and look forward to working with you further as you begin to focus on specific areas. I am interested specifically in administration of the self-determination policy, tribal government, health care, infrastructure, and management of facility construction on Indian lands.

I understand that this morning the special committee is concerning itself with a list of six topics. I believe my colleagues present today can talk with more authority on these subjects than I can because in my 30 years' service to the tribe I have placed great emphasis and time on development of a proficient and stable tribal government, community development, and economic development—especially in the creation of jobs for Choctaw people—and have not devoted much time to social services and law enforcement. However, they are very important to us.

I can comment on some of those topics, and I will be brief.

Indian contracting—one of these topics is the first that was listed, the area of Buy-Indian and sole-source contracting on reservations. On the Choctaw Reservation, all of our businesses, except our construction company, are chartered by the tribal council, have boards appointed by the council, and are thus 100-percent Indian-owned and -operated. The construction company is a State-chartered membership corporation, but only members of the tribe are authorized to be admitted to membership in the corporation, so it too is 100 percent Indian-owned and -controlled.

We thus have had no real experience with "Indian front" firms doing business on our reservation, although in past years we have had substantial problems with the quality of work produced by non-Indian contractors who were low bidders for construction projects on which the Federal agency required a bid process. We have heard, however, of Indians being used by non-Indian businesses as fronts, which we completely oppose.

In its consideration of the question of BIA's sole-sourcing contracts instead of putting them out for bid, I would urge the special committee to distinguish between the sole-sourcing of contracts to private non-Indian firms and the sole-sourcing of contracts to legitimate Indian-owned and tribal public enterprises like our tribal enterprises. If the business involved is a tribal business, such a contract would mean the creation and retention of jobs which are much needed by the reservation population. High levels of unemployment and their consequences are the largest single problem in Indian country today, and the Federal Government has the obligation to do what it can to create as many reservation jobs as possible. In fact, I believe the special committee could do a service for economic development on reservations by encouraging Federal Government agencies, particularly the Department of Defense, to procure as many goods and services as possible from Indian tribes.

Child abuse—the subject of child abuse, child neglect, and alcoholism has become a serious problem for tribal governments. We feel that in part this may be caused by our industrial progress and the transformation of our tribal society from an agricultural economy to an industrial economy, but we are not sure and have not conducted any studies. There have been no reported cases of institutional child sexual abuse by BIA employees in our schools in Mississippi, but the incidence of child sexual abuse in the community is growing. There are few means available to us to cope with this problem.

I believe the major need in this area is the capability for immediate action in social services, law enforcement, and our schools; action to isolate the child quickly from the problem; to detain the alleged offender; and to carry out a swift but thorough investigation, leading to conviction. But speed of this type is not currently available to us, and perhaps the reason is plain and simple: lack of adequate personnel and money. Our social services caseworkers have done an excellent job; however, their heavy caseloads do not permit the kind of in-depth family therapy and counseling that would prevent child abuse and neglect. The BIA school system is severely underfunded as well and cannot afford to purchase needed services, such as hiring a skilled psychologist to work with children and their families.

Our law enforcement department is underfunded to the extent that it has only one investigator and, in some cases, investigations are not conducted in a timely fashion. After the investigation is completed it is up to the U.S. Attorney to arrange arraignment and decide to take the case to the Federal grand jury, and the whole process takes several months to adjudicate, while the alleged offender roams free on the reservation.

I will leave the issues of the Solicitor's Office's performance and Indian gaming to my colleagues, who have greater experience with these issues. Because I am not commenting on them does not mean that I think there are no problems to be considered here. I know about the conflicts of interest relating to use of Indian natural resources and interpretation of Indian issues like water rights.

As for gaming, Public Law 100-497 has been enacted and the process of appointing commissioners is now underway. I understand that many tribes are not satisfied with provisions of the act. I also understand that for many tribes, Indian bingo is very important because in many cases it is their only form of economic development. A lot of them are not big bingo games, but they are a source of income for much-needed health care and community services.

The incidence of Indian bingo being controlled by outside shady characters is not widespread. Where it does exist, the Federal Government does have the responsibility of assisting the tribes in cleaning it up.

Finally, tribal corruption—the issue of corruption in tribal government is a sensitive and delicate one. It should be based upon complete investigation of evidence presented. In many cases, what causes corruption in any government is the lack of checks and balances, especially in the financial area, and the lack of separation of power between executive and legislative, without adequate descriptions of the differing roles and functions and adequate job descriptions for all tribal officials and employees.

Tribal constitutions are sometimes vague in describing responsibilities and the terms of office for officials are often too short. The original constitution of the Choctaw Tribe, basically authored by BIA, had only one governmental branch, the legislative, whose members served terms of only 2 years, after which everyone was up for reelection. In 1974, by referendum, we changed our constitution and now we have a chief elected at-large for a 4-year term; half of the 16 council members elected to 4-year terms every 2 years; and separation of the legislative and executive branches. This provided us with much-needed stability, ensuring the presence of at least eight council members who have previous experience in the workings of the tribal government, plus an executive branch that could carry out policies in a rapid and businesslike way that was still subject to the oversight of the tribal council.

Perhaps the most negative aspect of tribal government corruption is its potential for sabotaging reservation economic development. Self-dealing, kickbacks, and the draining of tribal resources do not permit the accumulation of the critical amount of tribal resources needed to capitalize economic and community development projects. In a word, it sacrifices the potential for raising the standard of living of all of the people to the greed of one or a few corrupt public officials. In such a situation there is no chance for progress.

The image of corruption in tribal governments has in many cases kept legitimate business and industry fearful of locating on reservations because they feel that in case of a business dispute they would not be given a fair legal process. Where corruption does exist, the tribal government, in cooperation with the Federal Government, has the responsibility to investigate and take the responsible individual to court. Tribes also have a responsibility through the democratic process for seeing that the tribal leadership is given to those who are honest and have a positive interest in tribal development. I give credit for our progress on the Choctaw Reservation in all phases of development over the past three decades to good tribal government structure and dedicated leadership.

There are many people who have a greater capacity to comment on these subjects than I and I am sure you will be hearing from them as the special committee pursues its investigation.

I appreciate the opportunity to be here and I thank you for inviting me to be here today.

[Prepared statement of Mr. Martin appears in appendix.]

Senator DECONCINI. Chief Martin, thank you very much. We will return with some questions.

I would like to hear from the other members of the panel. We will now hear from Wilma Mankiller. She is principal chief of the Cherokee Nation Tribe of Oklahoma, the second largest tribe in the country. She succeeded Assistant Secretary for Indian Affairs Ross Swimmer as the principal chief, and is the first woman to hold that position. Educated and trained in social work, she has been an active and respected innovator in the field of social science and in other areas affecting the tribe.

She has won several honors and distinctions for her work with the tribe, including an honorary doctorate from Eastern University, and is a recipient of the Harvard Foundation Citation for Outstanding Contributions to American Leadership in Native American Culture. She serves on numerous national, State, and local boards.

We are very pleased to have you here, Chief Mankiller, and if you will proceed with your statement.

STATEMENT OF WILMA MANKILLER, PRINCIPAL CHIEF, CHEROKEE NATION

Ms. MANKILLER. Thank you, Senator DeConcini and good morning.

Good morning, Senator Inouye.

I am the principal chief of the Cherokee Nation. We are located in the eastern part of Oklahoma. There are 93,000 registered Cherokees and probably another 20,000 that are not registered for one reason or another.

I appreciate the opportunity to testify before your special committee on the several topics that you have identified as being of particular interest at your hearings this morning. I share the committee's concern over a number of these topics and I hope to cover at least four of those topics.

I hope that my assessment of these issues and a description of the way the Cherokee Nation has addressed some of them will be helpful to the committee.

The first topic I will address, Mr. Chairman, is the responsibility of the Secretary of Interior and his counsel, the Solicitor, for management of the natural resources of Cherokee tribal lands. Allow me to summarize in a paragraph the story of Cherokee tribal lands over the last century.

About 100 years ago the Cherokee Nation acquired by treaty over 14 million acres located in eastern Oklahoma along, and generally north of, the Arkansas River. By 1910, the 14 million acres of tribal lands had been allotted and transferred to individual members of the Cherokee Tribe, and the Arkansas River bed had been determined by the Secretary of Interior to belong to the State of Oklahoma rather than the Cherokee Nation. Therefore, for the next 60 years the Cherokee Nation held no acknowledged riverbed tribal lands. Finally, the Cherokee, Choctaw, and Chickasaw Nations had to sue and the U.S. Supreme Court determined in 1970 that the tribes owned the 96-mile Arkansas River bed in fee simple. By this time, however, the Corps of Engineers—at the direction of Congress—had completed the construction of a series of dams and a navigation channel which occupies one-third of the riverbed. Unfortunately, this Federal construction project has seriously complicated any effort to develop or even identify the recently-reorganized tribal lands in the riverbed.

For nearly 20 years since the Supreme Court's declaration that the riverbed is tribal land, the Secretary of Interior has done little or nothing to identify or survey that land or initiate any actions to remove trespassers. This is true despite the laws Congress enacted to direct the Secretary to manage the oil and gas, the sand and gravel, and the other surface and subsurface resources on tribal lands. Today we are unable to remove known trespassers—whom we have identified in the hundreds—because by statute the only acceptable evidence in a trespass action is a survey certified by the Secretary's Bureau of Land Management. In fact, BLM has completed its survey of only 1 mile of the 96-mile riverbed it should have surveyed or authorized to be surveyed many years ago. If we could resort to self-help we would, but our hands are tied.

One very serious result is that natural gas reserves below our tribal lands are being drained by natural gas production from leases adjoining the riverbed. Without BLM-certified surveys, neither we nor the Secretary can defend the mineral leases on the riverbed that the Secretary himself initiated and approved. So land owners and lessees adjacent to the riverbed are permitted to enrich themselves at our expense and, perhaps more significantly, at the expense of our lessees who have paid for the drilling and production rights to the subsurface resources. We could not possibly be receiving the highest market value for our leases, as required by law, when competitive bidders know the lease they are seeking will not and cannot be defended by the Secretary.

Natural resource management problems between Indian tribes and the Secretary are a topic of future attention by the committee and I welcome this attention. I have more to say about the Secretary's failures in oil and gas leasing, and sand and gravel and other minerals management, as well as his failure to audit and manage these leases. Therefore I would like to supplement the record on this subject if I may, Mr. Chairman.

[Unavailable at time of printing.]

Ms. **Mankiller**. The second topic the committee asked me to address is BIA corruption in contracting. I think we are all aware of the problem of corruption; in fact, the President of the United States spent much of last week talking about corruption in Government, and there is much discussion on Wall Street of corruption. Our tribe is very concerned also about the issue of corruption.

I would like to take just a few minutes to describe an attempt that our tribe is taking to assure that corruption does not occur in our tribe.

I am convinced by my own work for the last 25 years in Indian communities that the best solutions to problems in native communities come from within our own communities and our own tribes. Therefore, in our tribe 5 years ago I proposed the establishment of an ethics commission when I was serving as deputy chief, and I have since refined that proposal and reproposed it. While the tribe has not had a specific, comprehensive code of ethics, we have always stressed the importance of good business practice. While I served as deputy chief of the Cherokee Nation I suggested this initially; once I became principal chief I developed and proposed tribal legislation for implementing such a commission to provide formal standards of conduct for all Cherokee Nation officials and employees.

This proposal is at this very time being considered by a special subcommittee of the Cherokee Nation's Tribal Council. We have forwarded a copy of our ethics commission proposal to the Senate committee's staff prior to today's hearing.

In addition to the ethics commission, we have regular audits by a Big Eight audit firm to sort of augment our program to provide ethical tribal government for our people.

While the draft proposal, of which your staff has a copy, needs some refinement, I believe it is the sort of self-regulatory initiative that should be implemented by tribal governments and not imposed by Federal or State laws or regulations. I will be happy to work with the Senate committee and fellow tribal leaders to encourage such initiatives in ethical tribal government.

One of the reasons that I believe it is important for tribal governments to operate ethical governments is that it is important for our communities to trust tribal government. I think it is important for tribal leaders to set the tone for ethical government.

Another self-regulatory effort undertaken by the Cherokee Nation to avoid problems or even perceptions of conflicts and corruption is our Tribal Employment Rights Commission. While well over a third of all the Indian tribes in the United States have such commissions, the Cherokee Nation has empowered its Tribal Employment Rights Commission with specific authority to regulate contractors and vendors who do business with the tribe under our auspices or those of the BIA. Through the Commission's efforts we can best protect the integrity of the tribe's financial interests and ensure maximum employment opportunities for tribal members in all contracting activities.

Just to give you a brief idea of the Commission's value to the Cherokee Nation, one of its primary responsibilities is to ensure that each employer, contractor, or subcontractor intending to engage in business activity with the Cherokee Nation must submit a contracting plan and receive plan approval. As the tribe offers substantial preferences to qualified Indian-owned firms, another important function of the Commission is to review and certify any firm seeking to do business with the tribe. To guard against brokering and fronts, the Commission staff requests and reviews all financial and other documentation necessary to determine whether the applicant is, in fact, at least 51 percent Indian-owned. Once the staff makes its findings, the Commission reviews the file, interviews the principals, and makes its determination. If approved, the firm receives a 1-year probationary certification before final certification is granted.

The Commission recently undertook the enormous task of recertifying all contractors with whom the tribe does business. We believe that we have in place the proper procedures for protecting tribal interests. We can always use more Federal assistance, however, such as guidelines for additional standards to adopt, and technical and financial assistance for training of Commission personnel charged with investigating and certifying potential contractors.

One reason I believe so-called "fronts" for Indian contractors succeed is because it is sometimes difficult for local and legitimate Indian contractors to obtain financing and meet the bonding requirements in order to bid on contracts.

A third issue raised by the committee is child abuse in BIA schools. I, like Chief Martin, have no personal knowledge of child abuse in the BIA school that we have contracted; however, the concern of the Cherokee Nation has been more with abuse of the BIA's discretionary use of funds for the schools and the resulting sacrifices in the quality of education that those schools provide our children.

Our response, once again, has been a hands-on solution. The Cherokee Nation has assumed control of the BIA school. Since that time the tribe has enjoyed major improvements in our education system. We now have a functioning school board which oversees curriculum and teacher qualifications. School texts are much more current, and a more progressive curriculum has been developed. One example is that we now have a math and science club, and recently had the NASA Spacemobile visit our school. We believe it is important that Federal and tribal funding be provided for continued upgrading of the residential school environment. This is of special interest to us because of the extra fiduciary responsibility that the BIA has to native people.

I have been asked to address gaming briefly. Congress has recently enacted legislation covering this activity on Indian lands, and I expect it may take some additional time before the need for serious changes in the present law can be assessed. There is no Cherokee program presently promoting gaming as a source of tribal revenue, but we have taken the position that Indian tribes should be permitted to take advantage of gaming as a source of tribal revenue. Correctly regulated, gaming could continue to be a significant alternate source of tribal revenue, particularly when more customary natural resources-based income cannot be enhanced because of neglectful administration of resource management laws.

In closing I would like to say that I believe very strongly that the BIA is an anachronism. It has barely changed since its inception, yet tribal governments have changed and the capacity of tribes to do things for themselves has changed dramatically. We have a lot of new initiatives that support tribal communities in the revitalization of tribal government and tribal communities, but the present BIA structure and attitude does not support tribal government and tribal revitalization. The large amount of funds that the Senator referred to this morning that is being spent on Indian programs—many of those funds are eaten up by the bureaucracy. So I believe that there needs to be, as a result of these hearings, some fundamental change in the way the Bureau operates its programs.

I thank you and the committee for the opportunity to testify here today.

[Prepared statement of Ms. Mankiller appears in appendix.]

Senator DECONCINI. Thank you very much, Chief Mankiller. We appreciate your testimony immensely.

Our next speaker will be Chairperson Kekahbah. Although Chairperson Kekahbah is relatively new in the position of tribal chairperson, she has extensive experience in tribal affairs, having been involved with Indian issues for the last 20 years. She is trained as a teacher and has taught for many years, holding an advanced degree from Pennsylvania State University. She also worked as a resident scholar for a major nonprofit foundation during which time she conducted a comparative study of tribal governments and other governments. She has sat on the board of trustees of that particular foundation and has been involved with numerous Indian organizations and other civil groups.

She is also a businesswoman and a publisher and author.

We welcome you here, Chairperson Kekahbah, and thank you very much. You may proceed with your testimony.

STATEMENT OF TWILA MARTIN-KEKAHBAH, CHAIRPERSON, TURTLE MOUNTAIN TRIBAL COUNCIL

Ms. MARTIN-KEKAHBAH. Thank you, Mr. Chairman. Good morning, Senator Inouye, Senator McCain.

My name is Twila Martin-Kekahbah. I am the chairperson of the Turtle Mountain Band of Chippewa.

Before addressing the issues directly I would like to provide you with some background on my tribe. The Turtle Mountain Indian Reservation is located in North Dakota and is one of the smallest in the United States, measuring 6 miles north to south by 12 miles east to west. It is probably the most densely populated as well. While we do not have an accurate census count, we estimate the population to be as high as 15,000 tribal members residing or adjacent to the reservation. Our total enrollment throughout the United States exceeds 25,000.

Reservation unemployment averages about 65 percent. The 1980 per capita income was $3,000. Our population is young, with 42 percent less than 16 years of age and a median age of 19.5 years.

The labor force has diversified employment skills, training, and experience. This labor force can accommodate a number of new enterprises which need to be developed. Major employers on the Turtle Mountain Reservation include the Government, tribal, State, and Federal; the Bulova Jewel Bearing Plant; the Turtle Mountain Manufacturing Corporation; the Turtle Mountain Corporation; and Uniband, a data base company.

The biggest concern for the tribe is the lack of employment opportunities, particularly with the closing of San Haven, a State-owned mental health institution. San Haven, located adjacent to the reservation, employed over 400 people, with 75 percent being enrolled tribal members.

To address the high unemployment rate, an effort to enhance certain factors of the economic environment needs to be undertaken to encourage growth. At least for our tribe, these are:

1. Financial resources allocated for marketing the reservation and its resources.
2. Enterprise Zone Designations need to be completed.
3. Business Development Assistance, Small Business Administration 8(a) Programs, and Buy-Indian Act need to be increasingly used.
4. The infrastructure development is required to enlarge the industrial park, water and sewer extension, road development, and multi-purpose buildings constructed.
5. The BIA grants and loans need to be increased to fund individual and tribal enterprises.
6. EDA needs an Indian set-aside.
7. Financial institutions need to be developed.
8. As in our case, a community foundation has been initiated by the tribe itself.

Rather than read the entire testimony I will provide an overview summary and then the recommendations found on pages 12 and 13 of the testimony.

Our overview of the issues as they impact on the Turtle Mountain Band of Chippewa Indians for each issue are as follows.

Child abuse—child abuse is caused by family disintegration, which is triggered primarily by massive unemployment and lack of resources. Approximately 50 percent of our students, grades 5 through 12, can be considered at risk because they come from dysfunctional families. Tribally-operated group homes are desireable; however, until such facilities are available the tribe continues to support three off-reservation BIA boarding schools as the only current facilities available to children from destructive surroundings.

Tribal governments continue to face very limited and frequently decreasing sources of revenue but are still expected to provide exemplary services. The vast majority of tribal people desire and support honest tribal officials. The major reason some tribal government officials become corrupt is due to the extreme poverty on the reservations, and these individuals are tempted to secure funds to enable their families to survive.

Bureau of Indian Affairs—they must respond to the Government's trust responsibility to tribes. The BIA has manipulated the Indian Priority System to benefit its own bureaucracy to the detriment of the tribes. BIA frequently makes arbitrary decisions regarding the Indian Priority System and other major programs without consultation with the tribes.

In addition, the Turtle Mountain Band of Chippewa Indians has had a particularly frustrating and costly experience with the BIA's maladministration of our leases on three Montana reservations.

Gaming—gaming has become a major source of tribal government operating revenue on the Turtle Mountain Reservation and many other reservations. Our tribe has established our own very effective gaming commission and code. We feel that the Federally-imposed gaming commission is redundant and a drain on legitimate tribally-generated revenues.

Contracting—legitimate Indian businesses are confronted by unfair competition from Indian front organizations. Indian businesses confront a variety of Government agencies, each of which has its own minority incentive criteria which must be met. Congress and the American public need to recognize the embryonic nature of Indian business development. The lack of any substantial business history, economic deprivation, and geographic isolation of the reservations are built-in unfair competitive disadvantages.

In conclusion I want to respond constructively to the issues addressed by my tribe. These are the recommendations on pages 12 and 13 in the testimony.

The Turtle Mountain Band of Chippewa Indians makes the following recommendations for the United States Congress' consideration in each of the following issue areas.

One, child abuse can be alleviated by, (a) Congress amending "638" regulations to allow tribal judiciaries to apply for direct funding. The Turtle Mountain Tribal Court is prepared to be a national model court to test direct funding; (b) a multi-faceted approach with sufficient and noncompetitive access to resources; and (c) expanding the Turtle Mountain Reservation-wide effective schools system pilot projects to other tribes throughout the United States.

Recommendation for tribal governments—they can be improved by establishing a national training institute for tribal governments.

Bureau of Indian Affairs—it must receive constant pressure from Congress to implement the Federal Government's trust responsibility. Specifically, Congress should instruct the BIA to, (a) implement the Indian Priority System equitably and not cut programs arbitrarily without prior tribal consultation; and (b) respond to the long-completed investigation on the lease mismanagement on the Turtle Mountains tribal lands and member lands in Montana. Specifically, how does the BIA intend to reimburse the tribe and our members for the mismanagement of these lands, some dating as far back as 40 years?

Gaming—while our tribe strongly opposed Public Law 100-497, unfortunately it is now the law. Nevertheless, we recommend Congress, (a) amend the legislation to remove previously-established gaming tribes from its authority, specifically our tribe, as the commission duplicates our own effective gaming commission and code; (b) leave all gross revenue with the respective tribes; and (c) if Congress insists on keeping the law, Congress should at least allocate the funds to pay for the commission, not assess tribes for a percentage of the gross on one of the very few sources of our tribal income.

Contracting can be improved by Congress through, (a) amending SBA 8(a) legislation to extend the status period beyond the current 9-year period; (b) approving legislation to match tribal and private funds with Federal funds to endow tribal community development foundations; (c) investigate Federal contracting procedures to assure that Indian "front" businesses are not receiving unfair competitive advantage over legitimate Indian-owned businesses; (d) review the Department of Transportation's Surface Transportation Act minority contracting goals as a national model to be applied to all Federal funds flowing to States which benefit enterprise and job creation; (e) establish one national minority business certification board which will certify legitimate Indian and other minority businesses. This certification will be acceptable to all Federal agencies; and (f) review, recent cutbacks of Federal agencies at national, regional, district, and State levels to reinstate Indian and minority outreach desks, wherever possible.

Like my colleagues Chief Phillip Martin and Chief Wilma Mankiller, I am very appreciative of having the opportunity to address these issues this morning. Thank you.

[Prepared statement of Ms. Martin-Kekahbah appears in appendix.]

Senator DECONCINI. Chairperson Kekahbah, thank you very much.

I do want to acknowledge our distinguished colleague from South Dakota. Senator Daschle is here; he says he will refrain from a statement at this time.

Our next panelist is Joe Flett. He is chairman of the Spokane Tribe in Spokane, WA, a major tribe located in the Pacific Northwest. He has served as the tribe's principal elected official for over 3 years and has served as a councilman for 8 years.

Chairman Flett is also chairman of the Upper Columbia United Tribes Fishery Consortium, a consortium which includes several tribes in the area, and represents the consortium on fish and wildlife issues. The Spokane tribe is a member of the National Congress of American Indians and the Council of Energy Resource Tribes.

Chairman Flett currently serves as a member of the Education Committee of the Council of Energy Resource Tribes concerning college education programs.

Chairman Flett has previously testified before Congress on timber issues and many other issues.

Chairman, I understand that you had many difficulties in getting to these hearings with cancelled airplanes and scheduling two or three flights, so we particularly thank you for the extra effort that you made to be with us today. Will you please proceed.

STATEMENT OF JOE FLETT, CHAIRMAN, SPOKANE TRIBE

Mr. FLETT. Thank you, Chairman DeConcini, Cochairman McCain, Senator Daschle, Senator Inouye.

I was thinking last night on my way to Washington that with all the trouble I've had getting here, either I must be out of my mind or else this is very important to me to make it under the circumstances that I've been through.

I appreciate being given the opportunity to testify before the Select Committee on Indian Affairs. I have been made aware of the topics to be addressed by the special committee during this round of hearings.

Let me say at the outset that I believe that the special committee has selected issues of importance to my tribe and to Indian country as a whole. I would like to address my remarks to the following subjects because I believe these issues are of particular importance to the tribe.

First of all, I have the honor of representing the Spokane Tribe as a councilman now for 8 years, the past 3 years of which I have been the tribal chairman. The Spokane Tribe has an enrollment of just over 2,000 members, 856 of whom live on the reservation.

Our revenues are derived from the sale of timber as well as mining, grants, and contracts from Federal and State agencies. The unemployment rate varies from 40 percent to over 80 percent through the year. As of January 1, 1989, the rate of unemployment was 69 percent. The average yearly income for the reservation is $9,968 per household. This was derived from a recent survey conducted this past fall by our economic development planning organization.

With the low income and high unemployment rate come many problems—alcoholism, child abuse, and so forth. Many of our tribal members cannot afford proper housing, which is of great concern to tribal leaders. I am troubled by the lack of adequate dollars to cover the costs of constructing proper housing for our people. With the amount of money and the number of houses to be built by the contract, we usually end up with a much less quality home than was originally planned for. Also, the contractor at times is not the one who will or can do the right job of building a good quality home.

There have been instances in the past on our reservation of poorly-constructed homes which seem to start deteriorating once the 1-year warranty has expired. Who is responsible for this? There are homes where the foundations have cracked prior to any building of a structure. There are instances of one corner of the house that sits 4 to 6 inches off the foundation. It seems we are left with only one contractor who is bidding the houses, and it is questionable as to the good faith effort to provide a good quality home.

I do not know whether or not the contractor is indeed a legitimate company controlled by Indian people or just a front. I am sure if one could contact other tribes they, too, would have similar problems. I understand this is one area the committee will be devoting hearings to at a later date. I believe that the Spokane Tribe would like to be involved in that.

The committee has announced its intention to address tribal corruption. Although I can only speak to the Spokane Tribe, which is free from these types of abuses, one does hear of other situations with other tribes. I believe that any type of corruption should be looked into, whether it exists in the Federal, State, private, or tribal government, and I support the committee in its efforts to examine these issues.

In the area of social issues, we—like most everyone—have problems in the area of child abuse and neglect. From December 1987 to December 1988 there have been 14 charges brought to our Indian Child Welfare Committee. Of these, eight have been substantiated as being true. I know of no cases involving the school system or the various child protective programs within the reservation. There are no BIA schools located on the Spokane reservation; therefore I really cannot comment on the BIA schools.

Again, the high unemployment rate on the reservation has a direct impact on our children.

I would like to comment briefly on Indian bingo. Our tribe, like many others, has a bingo operation which is run solely by the tribe. With the establishment of the bingo hall it is easy for one to see the potential for the tribes to lose control of their gaming operations and lose important revenue generated by the gaming activities. The Spokane Tribe was approached by some management companies in the beginning. They had made an offer of developing a $2 million complex "for the tribe." In following up on their proposed contract it was found that most of the revenue generated would go to the management companies.

The proposed contract was for a 15- to 20-year period. Fortunately the council rejected their offer and made the decision to implement and run the bingo operation ourselves.

There has been talk of organized crime having control of some bingo operations. I don't know this, but I feel it could be an area that the committee may want to spend some time on. The potential loss of revenue to the tribes is too important for the tribes to take any kind of loss.

I understand the committee will be assessing whether Indian interests are being properly represented by the U.S. Government in its capacity as trustee of Indian people. I do feel this needs to be explored because so many times the needs and interests of Indians take a back seat when they may conflict with other governmental interests.

There are times when the Indian people have to accept something that is less desirable just to get the bureaucracy to move. We oftentimes give in to the Government just to get the few dollars that they hold. An example is the waiting period that one goes through when in litigation. There are times when tribal interest is lost due to the lack of response from the various governmental agencies. It is aggravating to keep asking a judge to wait and to hold off from proceeding with litigation when a response from our trustee is pending. It has cost tribes many dollars to have to come back to our Nation's capital, to talk to the Bureau or whomever will listen, only to find that the necessary paperwork has been sitting on someone's desk or filed away somewhere.

The regulations imposed on tribes in meeting time schedules should apply to the Government agencies also, or even more so. In adhering to regulations, the governmental agencies with the responsibility of protecting a resource should be made to comply with regulations also. When a contractor or lessee is in violation of regulations they should not be allowed to continue their work until they are made to come into compliance. The reverse of this is usually the case, to the point of losing a resource of the tribe. Who suffers? Only the Indian people.

In closing, I would like to thank you again for this opportunity to address the committee. I fully support the efforts of the committee. There have been times when just the idea of having investigations has brought a response from the governmental agencies.

On behalf of the Spokane Tribe, I thank you for this time.

[Prepared statement of Mr. Flett appears in appendix.]

Senator DECONCINI. Chairman Flett, thank you for your testimony.

Now, at random, we will ask some questions of the panel. I wonder if Chairman Inouye has any questions?

Senator INOUYE. Mr. Chairman, I have just one general question.

When we began the investigation about 1 year ago it was forcefully brought to my mind that there are many words that are used—self-determination, Federal policy, reservation, implementation of laws, jurisdiction, et cetera. This would all suggest that there is something very basic underlying the so-called problems. We used the word and phrase "trust responsibility." I think that in order for this committee to understand what is underlying all of our problems, it would be well if we understood what you mean by sovereignty. Your definition of sovereignty makes a difference in your sovereign relations with the sovereign United States.

So if I may, may I ask a general question? How would you define sovereignty in Indian country, or Indian sovereignty, and how would you define the sovereign relationships between Indian country and the United States?

I realize this is a broad and very complex question, but if you prefer to submit a paper, I would be most interested.

Ms. MANKILLER. Mr. Chairman, I would like to respond to that if I might.

Senator DECONCINI. Please.

Ms. MANKILLER. I would like to submit a paper because asking an Indian the meaning of sovereignty is sort of like asking somebody the meaning of life. So I think it's something that requires a lot of thought and I'd like to submit a paper.

But just to sort of summarize, I think that tribal sovereignty is the right to self-government. Our relationship and the relationship that we want to continue with the U.S. Government is a government-to-government relationship.

Many of the problems that we have today are that we have been victims of so many changing Federal policies and so many shifts in Federal policy. I think that finally many native people have come to the conclusion that the best solutions to our problems are within our own communities. They are not with the Indian Health Service and they're not with the BIA and they're not really with the U.S. Congress. We need some resources, but we have to trust our own thinking again, and the best solutions to our problems in our fight for the right to self-government and tribal sovereignty lie within ourselves. I think that my description of tribal sovereignty would be self-government, the most basic right to self-government and economic self-sufficiency and the right to practice our culture, language, traditions, and religion.

Senator DECONCINI. Chairperson Kekahbah, would you care to comment?

Ms. MARTIN-KEKAHBAH. Yes, I go along very wholeheartedly with Chief Mankiller.

In addition I was thinking that, regarding the court system, without a stabilized court you can't have stable government. I feel very strongly about our own laws. I know that within my tribe in particular we do have the codes to apply to the necessities of providing stability to our people. At times when we look at the fact that we are new in tribal courts, new in tribal government in the sense that it was imposed upon us in this form—and from my perspective we've come a long, long way in a short period of time. I feel like we're continuing to go in that way.

I think that, despite the various allegations, I see more of what I would define as true self-governing by the people. It's coming about. I think that with less Federal intervention we're going to get there.

Senator DECONCINI. Chief Martin, do you have any response to the Chairman's question?

Mr. MARTIN. I think that to be a sovereign Indian tribe is very difficult because when you're sovereign, you're pretty self-dependent. You're dependent on your own self. When you have to depend on somebody else, it makes it difficult.

But I think we have demonstrated some sovereignty by developing tribal governments. We are able to negotiate with local and State governments and the Federal Government—and I think foreign governments, too, if we wanted to—but to me, relationship with government shouldn't just be BIA and IHS. To be a sovereign government we need to have more contact with Congress. That way you have two States talking to one another. I think that's tremendously lacking.

I think if any money is to be exchanged, then it should be between Congress and the tribe. That would give us more sovereignty than having to deal with the whims of Federal agencies and the bureaucracy.

Senator DECONCINI. Chairman Flett.

Mr. FLETT. I also agree wholeheartedly with the other three panel members. I think that Indian sovereignty is our ability to govern ourselves. The government-to-government relationship that is spoken of throughout the Nation needs to become a truer government-to-government relationship. The tribes should have the ability, as Chief Martin has stated—we need a relationship with the Congress so that when there is a need for implementation, when there is a need for appropriations, that there will be a more direct contact with the people of Congress. I think that as stated in some of the testimony, once appropriations are made through the Department of Interior, what funnels down to the tribes is much less than anticipated. It highly impacts the ability of the tribes to conduct business as it should be conducted.

Senator DECONCINI. Thank you.

Chairman Inouye, any other questions or followup?

Senator INOUYE. Thank you very much, Mr. Chairman. I would like to stay for the rest of the morning but I have another commitment. I will be back this afternoon.

Senator DECONCINI. Thank you, Chairman Inouye.

I do have one question I'd like to present to the panel, and we'll start with you, Mr. Martin, just because you were the first to lead off here.

In the area of complaints about Indian fronts in contracting, whether it be for supplies or construction work, where you deal with independent contractors where the tribe does not have a construction firm, some of you laid out some very detailed manners of investigation. That impresses me that there is authority there and it has been exercised to review the financial statements and to be assured of Indian ownership.

I wonder—starting with you, Chief Martin—if you can tell me, have you had problems on your reservation? And if so, how have you prevented or minimized the misuse of Indian fronts?

Mr. MARTIN. Well, we haven't had too much experience with Indian businesses per se, but we have had experience with Federal agencies contracting with non-Indian firms to come build houses or infrastructure on the reservation, where the tribe is the beneficiary but has very little to say about that transaction.

So we got smart and developed a tribal construction company, and now we do a lot of our own construction of residential, industrial and commercial buildings. We still have a lot of problems, though, being the sole contractor, because Federal agencies like EDA and HUD and even BIA have stringent requirements that you have to go through. So not being, SBA 8(a), we don't benefit from that. Most of the time, however, we are able to work that out, but we have lost some projects because we had to go through the bid process.

Senator DECONCINI. You don't contract with any independent contractors for the tribe's purposes?

Mr. MARTIN. Well, we contract such things as auditing services, hospital C.M.C., equipment, supplies. We have all kinds of small contracts, but where I come from there are not many Indian businessmen available to contract with.

Senator DECONCINI. Chief Mankiller, do you have any——

Ms. MANKILLER. Yes; we have a significant number of Indian contractors. We actually were very concerned about Indian fronts, which is one reason we put together the TERO commission and have tried to put together some pretty stringent rules. I have to admit that we could use some technical assistance and some more training, but we're doing our best with the resources we have and the information we have.

We implemented the procedure about 1 year ago——

Senator DECONCINI. About 1 year ago. And before that, I take it, you had some severe problems?

Ms. MANKILLER. We had some suspicions that businesses that were doing——

Senator DECONCINI. Was it a problem of not being able to investigate and be satisfied that it is truly 100 percent Indian-owned firm?

Ms. MANKILLER. Yes; because of not having any criteria by which we could determine whether or not someone really was a legitimate Indian contractor.

Senator DECONCINI. Chairperson Kekahbah.

Ms. MARTIN-KEKAHBAH. On my reservation we have over 100 Indian-owned businesses. Those are legitimate businesses. They are owned by the people there. The services that they provide are services that the people need.

The fronts that we have come in contact with are primarily those fronts that use private certification for being recognized as a minority business. The legitimate Indian-owned businesses that are indeed 51 percent or more Indian-owned, we can tell the difference. For example, I remember calling Chief Mankiller's tribe earlier this year regarding an electrical company that was going to do work on a 638 contract that we have, construction of a new school and a new health facility.

I think what's happening is a need for tightening up—and this is why the Department of Transportation's forms that they use in certifying minority businesses are much better than any other form—they have a tighter restriction. When we have Indian companies that go through the Department of Transportation's form usage, we know that they are legitimate. Otherwise, there are major problems.

Senator DECONCINI. On construction contracts where the contractor is required to get a bond, have you had problems with the Indian business being able to qualify for bonds?

Ms. MARTIN-KEKAHBAH. Yes; we have had numerous problems with our legitimate Indian businesses, and this is why I speak in my full testimony that there needs to be something done regarding the flow of capital into these legitimate businesses, as well as the ability to bond. For example, any project that we have that is over $25,000, the Indian business must be bondable. In some cases it's difficult, particularly in an isolated geographical area like mine, to get some of the surrounding banks to assist in the bonding, whereas you have the fronts coming out of all the woodwork.

Senator DECONCINI. And they can provide a bond.

Chairman Flett.

Mr. FLETT. Mr. Chairman, I think the Spokane Tribe throughout the years, prior to 1982, had difficulty with some of the contractors as far as housing and mining, all different facets of business on the reservation. To the degree of trying, the tribe had tried to have the contractors hire our local people. Without the TERO ordinance in effect it is very difficult. The contractors would not recognize the tribe's efforts to have them do this. Prior to that there were many problems. Since the implementation of our TERO ordinance I think things have turned around, although we still have contractors that are new to the area that still try to keep from hiring local people.

Also, the Spokane Tribe is in the infancy stages of developing a business license where we would require any potential business or contractor coming into the reservation to apply for, with a fee. Therefore we would have the ability to run a check on these businesses to find out if in fact they are legitimate. That is in the development stage. Because of the problems in the past we felt that this was one step forward for the tribe to try to alleviate the problems.

Senator DECONCINI. Do you have the resources to do that investigation?

Mr. FLETT. At this time, no. We hope, with the help of the Bureau of Indian Affairs through their different offices, to find some means of doing so because it is a very important part of the tribal government to do so.

Senator DECONCINI. Obviously if you're going to have self-determination and have sovereignty over your own affairs, you have to have the capacity and capability to do those types of investigations yourself.

Mr. FLETT. Right. What we were contemplating in our development of a business license is a fee, and using that fee to—once a business is established on the reservation—to hopefully use part of that fee as part of the administrative costs.

Senator DECONCINI. Thank you.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

Following along the lines of the question asked by Senator Inouye and the responses that you made, in which I think there is certain unanimity and eminent good sense, it seems to me that if we want to reduce dependency upon the Federal Government, if we want to reduce or eliminate the problems that Indian tribes have of being subject to the whims of bureaucratic policy changes, isn't it reasonable to assume that the key element in removing this dependency and exercising tribal sovereignty would lie in the area of economic development?

The reason I say this is that it's not clear to me how an Indian tribe can be independent and at the same time have a national average of somewhere over 30 percent unemployment on Indian reservations—and in my opinion that number is badly skewed because it doesn't account for the fact that on many Indian reservations the majority of the employees are employed by either the Federal Government or by the BIA.

It seems to me that particularly in remote reservations, and it's not only inappropriate but it's unfair to categorize all reservations being the same because we know that they are vastly different, but it seems to me that one of the areas where the Federal Government is in helping to create an atmosphere of economic development, the placement of businesses on reservations, encouraging an atmosphere of perhaps taxation variances to encourage the establishment of what have become known as Enterprise Zones, and to thereby create an economy and job creation to the point where you truly can exercise independence rather than being dependent on the BIA or the other agencies of the Federal Government, for funding and sustenance.

Senator MCCAIN. I would like to ask your comments on that concept, starting with you, Ms. Kekahbah.

Ms. MARTIN-KEKAHBAH. Senator, it's rather ironic that we start out with something that I consider a differing viewpoint based upon the gaming, for example. I'm going to read this section from my testimony.

> The committee should be aware that Indian bingo is an important source of income on our reservation. The tribe owns and operates a bingo palace which employs 30 members of our tribe and which has become the tribe's largest source of operating revenue.

A tribal gaming commission has been in existence for 2 years to establish regulations and oversee all gaming operations within the jurisdiction of the tribe. For the last 2½ years we have employed a tribal gaming inspector who monitors the day-to-day activities of gaming operations. We have an accounting system which verifies all income derived from gaming operations. Also, we have adopted a tribal gaming code which includes penalties for violations. Based upon our capability to regulate our own gaming, we are applying for self-regulation under Public Law 100-497, the Indian Gaming Regulatory Act.

The formation of a national watchdog commission and forced compact with the States undermine our tribal sovereignty. The formation of this commission, which is, incidentally, a duplication of our own tribal gaming commission, is only another means of non-tribal agencies getting a piece of the action. Tribes are required to assist in the funding of this commission by being assessed a percentage of their gross proceeds of gaming revenue. We do not receive assistance in the funding of our judicial system to set regulations and enforce law through highway user's taxes or Federal excise taxes, which we as Indian people also pay, nor do we receive funding for alcohol prevention and treatment programs from the taxes paid through the sales of alcohol and tobacco on our lands.

Within the State of North Dakota, in compliance with Public Law 100-497, the only gaming operations we could host through a compact agreement would be blackjack and parimutuel betting. The State of North Dakota is also proposing to outlaw pull-tabs. If we are faced with the loss of our main source of revenue, is the Federal Government willing to assist in our plans of economic development and self-determination? Or are we approaching economic genocide? The Indian Gaming Regulatory Act is a forced taxation upon tribes involved in gaming.

See, I think what I'm getting at here is that we did step forward by using our gaming as a form of economic development only to be stopped by Federal intervention.

Senator McCain. Let me just say in response that I was one of those who was totally opposed to that legislation. I think it was wrong. In fact, I think it might have some constitutional implications concerning State and tribal relationships which could cause it to be overturned if there is a court challenge. But I also feel that—and you might agree with some examples from my own State—that some form of regulation was needed, if only along the lines of what has been implemented in your tribe and has not been in several other tribes that we know of, including several in my own State.

I think there's a problem there. I think these hearings will reveal the problem. I'm just not sure—in fact, I am convinced that the solution was not a correct one.

Ms. Martin-Kekahbah. Thank you. I agree with you.

Senator McCain. Thank you.

Ms. Mankiller.

Ms. Mankiller. I agree that a whole part of self-government and tribal sovereignty is economic self-sufficiency. When we reorganized our tribe 17 years ago and began to provide services, 72 percent of our revenue was from Federal sources. For the audited 1987 financial statements of the tribe, only 49 percent of our revenue was from Federal sources.

We have a manufacturing company called Cherokee Nation Industries which is an exemplary manufacturing company. We even do some Defense contracting. We have a business called Cherokee Gardens which is a greenhouse and horticulture and nursery operation. We have two very profitable gift shops, a wood-bundling operation, and other operations.

So we agree. I tend to be a little skeptical about Enterprise Zones and those kinds of initiatives because I don't think there are a whole lot of businesses out there that are just dying to come to the middle of nowhere, which is where most reservations are located. I think that probably what is more workable is for tribes to develop local businesses from the outset and have more resources available to them for local development of businesses. Virtually every business that we have that has been successful we have developed and operated ourselves. Every business that has failed has been a business that we have tried to entice to come there, and that simply has not worked.

So I would support more resources that would help us work in partnership with the Federal Government to develop the economy. So I think you're right, I guess. That's what I'm saying.

Senator McCain. Thank you.

Chairman Martin.

Mr. Martin. Yes; I think economic development is very important to tribal government and tribal self-sufficiency. I think some things can be done other than [illegible]go. I believe that a local service-type economy can be developed, as well as economic and industrial development-type jobs that can be created.

I'm not just talking. I have done this. In 1979 we entered into a contract agreement with Packard Electric, a division of General Motors, with a $500,000 contract and 25 employees. Ten years later we have nearly 1,500 people working, over $40 million worth of sales.

I come from an area that is not really conducive for anything, but we have developed this and we have changed the community and the surrounding area tremendously. We have made an economic impact not only on our own economy but on the surrounding area as well. So that has brought on a good relationship with the local community and other governments locally.

I think the Federal Government has a responsibility to be the third party in the situation of the private sector and the tribe. I think that the three working together can make some things happen on Indian reservations. Detroit sends material to Third World countries, has the material assembled, buys it back from them and then turns around and sells it to us at a higher price.

But at any rate, I strongly believe that economic development should have high priority——

Senator McCain. And the Federal Government should play a role in that?

Mr. Martin. Yes.

Also, we were talking about so many billions of dollars being appropriated for Indian affairs. I think what we're talking about here as tribal leaders, is that money should go directly to the tribe rather than going to the bureaucracy where they're not performing. They're not even accountable in many cases to be productive.

So I think that if we got the money ourselves we could develop plans and manage the money in such a way that I think we could get results.

Senator McCain. I know of the enormous success story of your tribe in attracting businesses. We have a facility on the Hopi Reservation which I think is the best of all worlds. There is a facility there that was vacant for some years and is now occupied by a Korean hat-making company which manufactures hats and sells them to the Japanese.

Mr. MARTIN. Yes; I've been there and I've seen them do the Department of Defense work, too. They're doing very well.

Senator MCCAIN. Indeed. Thank you.

Chairman Flett.

Mr. FLETT. Economic development for Indian tribes is very important. The talk of Enterprise Zones—I really have to see one that is working well to believe in them. There have been some established on the West Coast, and so far I really haven't seen them be that effective yet. Maybe they'll come along, maybe not.

As has been mentioned, a lot of tribes are within the areas that are really questionable as far as whether a business would like to locate out in the middle of nowhere. It's very difficult, not only in that aspect but in the fact that most businesses are wary of tribal governments and the potential for the political things getting involved in the business and making the business fail.

I believe that with the assistance of the Federal Government, of the tribal governments and the business entities, and possibly the locations—in our instance the proximity of the city of Spokane—we've recently become involved in their Chamber of Commerce meetings, their economic and trade development councils, and slowly but surely we're becoming recognized. Hopefully it will spawn into something that is beneficial to all of us because with the upcoming development of our area, and particularly to the Lake Roosevelt area which is our southern border and western border, there is great potential. But we do need the assistance. I think, as has been stated throughout the day, if there are appropriations of any means coming, we need to get them and take full advantage of them without the filtration system that normally happens.

Senator MCCAIN. I would like to thank the panel for providing an important contribution so that we can frame the course of these hearings. I think you've made an important contribution.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you.

Our next witness will be Russell Means.

Mr. Means, we welcome you here.

An Oglala Sioux Indian, Russell Means has been an important and vocal leader for over 20 years. Along with Dennis Banks he cofounded the American Indian Movement, known as AIM, an influential group representing many American Indians. Mr. Means attracted national attention when he and other AIM members led hundreds of Indians in the 71-day occupation of the town of Wounded Knee, South Dakota.

He has spoken and acted for Indian groups all over the world and has recently suffered a combat wound in support of the Mosquito Sumarama Indians of Nicaragua. Mr. Means is a sought-after lecturer, having spoken to numerous major universities over the past ten years. When not addressing Indian issues, Mr. Means pursues several business interests.

Mr. Means, it is a pleasure to have you here. Would you please proceed with your statement? And thank you for waiting, sir.

STATEMENT OF RUSSELL MEANS, INDIAN LEADER, MEMBER, OGLALA SIOUX TRIBE

Mr. **Means**. [Remarks in native tongue.]

This is the traditional greeting of my people that I am bound to give, albeit a short version. What I said in my own language is translated into English thusly:

Hello, my relatives. I am an Oglala Lakota and I come from our very sacred holy land, the Black Hills, where Yellow Thunder village is.

My mother is from the War Eagle clan and my father's family is from the Crazy Horse clan.

This greeting, to this day, is the way all Indians throughout the Nation still greet one another, those who still know their culture. This is the only way we present ourselves to one another that is acceptable. We tell you who we are, where we are from, who we are from, our clans, and we do this without ever saying our name. Anything less would be an insult to you and to my people.

Senators, my morning prayers to the Great Mystery always include you and your colleagues in Congress, as well as leaders in all governments. It is an honor to come before you as a spokesman for my people, the American Indians of the United States of America. In these United States of America, this great country of ours, we American Indians can be anything we want to be except American Indians. That is created by the laws of this Nation and condoned by it subsidiaries, the so-called tribal government, and designed for the Indian to fail, to be expendable, to be eliminated.

I take you back in your history, after the American Indian "hostiles" had been subdued and forcibly confined to Indian reservations. It took approximately 30 years, one generation, for us to adjust and become economically viable, contrary to what the anthropologists say and even what we ourselves are taught as Indian people. However, the allotments were made smaller; our remaining lands were opened to homesteading; and we were forced into reducing our livestock. Nevertheless, we made the adjustment again in less than half the aforementioned time, 15 years to become economically self-sufficient again.

But once again the American Indian was forced into reducing our livestock. The "Boss Farmer" concept was instituted. We were told what, when, where, how much, and how little we could grow. This applied to agriculture and our livestock. Again we recovered in a time span of approximately 15 years.

We were so successful in our third recovery that the American Indians enjoyed the finest of economic times while the rest of the industrialized world was wallowing in the Great Depression. It was then that President Roosevelt introduced the Howard Wheeler Act, better known as the Indian Reorganization Act, the IRA, which institutionalized the so-called tribal governments, which are not one of our institutions, and it is still foreign to us this very day.

We have yet to recover.

Forty-five years later the IRA Indian tribal governments, on their own initiative, began renewed efforts at reestablishing their sovereignty, focused on the oldest profession of American Indians, and that is gambling. Bingo and other gaming operations without exception have been a proven initial success. Failure through mismanagement, politics, or litigation has been less than 15 percent. Showing a better than 85 percent success rate, the new Indian-sponsored gaming industry on reservations dwarfed the success ratios of any and all other non-Indian industries in America.

Gaming operations have proven to benefit the revenue gathering of all governments, be they counties, States, or Indian reservations. With regulation of bingo and gaming by the Congress, we are experiencing a repetition of history. One shouldn't remedy success.

The results? The U.S. Government, through Congress, once again intervenes to regulate a proven success in violation of all basic and fundamental rules of economics and totally contrary to all laws of capitalism.

American Indians are human beings. We are supposed to be citizens of the United States of America. We fought in your wars in other countries. Our Navajo Nation Code Talkers served and saved this Nation in World War II. We have the inalienable right to joint venture with whom we choose as long as we do not harm anyone nor commit fraud upon anyone. There is no piece of evidence anywhere that proves Indians ever conspired with criminal elements to establish bingo.

The Bureau of Indian Affairs, the infamous "Colonial Office" of the Department of Interior and the initiator of sleaze in Government, has been regulating contracting on Indian reservations since 1824. This fact alone should convince and teach every student of government that regulation of commerce and enterprise does not work. In fact, it only produces the opposite result. Graft and corruption are rampant through the contracting auspices of the BIA and its surrogate tribal government. Indian front contractors bid for and receive Government contracts only to proceed to build shoddy, dangerous bridges, buildings, schools, roads, and dams. The Indian is the scapegoat when there is a failure, and is always the one indicted. Contracting on reservations has proven historically to breed and feed corruption within the BIA and now, the tribal governments.

Within the past 2 years I have personally attempted to assist seven Indian reservations located in the southwest, the northwest, and the northern plains, to no avail. The investors I represented were from various groups interested in establishing banks, resorts, Indian-owned public relations firms, factories, fishing ports, and international trade. I now know that tribal governments do not want economic development unless graft is a major ingredient.

The BIA is a major player in land leases being sold by petty bureaucrats for as meager an amount as $40. There is a scandal of monstrous proportions occurring in at least two Indian agencies, the BIA's Branch of Land Operations and the Branch of Realty. I challenge this investigating committee to intricately go into the Branches of Realty and Land Operations. The BIA does not enforce its trust responsibility; quite to the contrary.

In September 1987 I moved from the poorest county in America, the Pine Ridge Indian Reservation, to the richest area in the country, the Navajo Indian Reservation. There is no difference.

I paraphrase the former Secretary of the Department of the Interior, James Watt: if you want to see an example of failed socialism, go to an Indian reservation.

The poorest and richest reservations in our Nation suffer from identical problems of mismanagement, a bloated patronage system, no checks and balances, and tribal governments' waiver of sovereignty in order to initiate debt. This is not anything new. This is an everyday occurrence in all tribal governments.

The problem is leadership. In this case it is the lack of leadership. Ironically, everyone—including you Senators—refers to the allegedly elected tribal officials as "leaders." Leaders are supposed to work for a better quality of life for their constituents. It is an insult to my heritage, my ancestors, and my dignity as an Oglala Lakota to have the term used loosely.

Many of the tribal officials are honest and sincere men and women who have good hearts. Nevertheless, a vast majority of the tribal officials parasite on the incestuous world of tribal politics—not as our forefathers, the best providers, protectors, defenders, advocators, and friends. The game of who is the most important rules. It's embarrassing.

At the turn of the century American Indians numbered about 230,000, all traditional. With each succeeding generation we lose our population base and our spirit as once-proud peoples. The American Indian statistics of deprivation have remained constant since the end of World War II. The fortunes of all other groups of citizens rise and fall with the Gross National Product. The American Indian statistical line of deprivation remains constant, a straight line.

With the blatant genocide of our traditional people we have less than 50,000 in America today. We are averaging a loss of 1,000 a year since 1900. We are losing a value system as distinct people that sets us apart from the industrialized world.

These facts surface in our tribal statistics, and no one attempts to do anything about it except for a few social workers and reservation police.

This new statistical horror is women and child abuse. Child sexual abuse is epidemic on Indian reservations, and all you hear are whispers. This abuse can be directly attributed to the schools on the reservations. Education in the BIA, public, contract, and missionary schools does not teach positive values from non-Indian culture and, in collusion with the BIA, certainly does not allow Indian culture and values to be taught. The fact is that educators continually denigrate American Indian traditional lifestyle as primitive, dirty, and without any redeemable virtues, and the tribal councils condone it.

Needless to say, every time the U.S. Government has interfered with American Indian lifestyles it has been proven to be disastrous.

In the 1960s legal services were implemented in Indian reservations. It was a boon for the people. Tribal officials all of a sudden were held accountable. Legal services stepped in and, lo and behold, tribal courts had power through the power of attorney for the people. The result? An edict from Washington, DC is handed down and legal services can no longer represent people against the tribal government, and they can no longer represent class action lawsuits against any government. Presently legal services are not much more than a mill for divorce lawyer trainees.

Congress passed the American Indian Religious Freedom Act in 1978. To date, six cases concerning our freedom of religion have reached the Supreme Court. We lost every one of them. We do not win lawsuits. State governments lose. The only time we allegedly win a lawsuit, it is in reality the Federal Government winning out over the sovereign rights of a State.

Once again, the American Indians are the pawn.

The major factors preventing American Indian people from exercising rights to self-determination—American Indians suffer under a system of dual citizenship; that is, your citizenship and tribal citizenship maintained by the BIA. Only Hitler did that. The dual citizenship is a major obstacle in the free exercise of individual and tribal sovereignty. The continuing loss and attrition of existing lands to various Federal, State, and local laws and/or regulations is a hinderance, an abridgement of sovereign rights to remaining lands, and the arbitrary monetary policies of settlement of these rights whenever they are recognized.

Another major factor preventing Indian people from self-determination is the subjugation of the American Indian individual to the laws of government-sponsored tribal governments and the continuing arbitration of the BIA rules and regulations which have the force of law, yet are not repealable.

Solutions? The American Indian people's right to self-determination is recognized and will be implemented through the following policies.

The American Indian individual shall have the right to choose his or her citizenship, and the American Indian nations have the right to choose their level of citizenship and autonomy up to absolute independence.

The American Indians will have their just property rights restored, which include rights of easement, access, hunting, fishing, prayer, and water.

The BIA will be abolished, with the American Indian tribal members deciding the extent and nature of their governments, if any.

Negotiations will be undertaken to exchange otherwise unclaimed and unowned Federal property for any and all Government obligations to the American Indian nations, and to hold fully liable those responsible for any and all damages which have resulted from resource development on or near reservation lands, including damages done by careless and inexcusable disposal of uranium mill tailings and other mineral and toxic wastes.

I want to thank you gentlemen for inviting me here. It's been a high honor, especially since I'm the only one invited to testify here today that doesn't receive money from the Federal Government.

Also, I was introduced as a former founder and leader of the American Indian Movement. The tribal chairwomen that you have here, are former associate of the American Indian Movement back in the days when we were gross militants. I just wanted to let you in on that, that the American Indian Movement is a very proud, continuing part of American Indian society.

I thank you.

[Prepared statement of Mr. Means appears in appendix.]

Senator DECONCINI. Mr. Means, thank you. You certainly have left us with many provocative thoughts about the problems facing American Indians today. You were kind enough and wise enough to also make some suggestions. I think that is what this committee is looking for. We may agree or not agree with them, but it is important to have some thought-provoking ideas of where we should go from the standpoint of the relationship between the Federal Government and the American natives.

I do ask you a question. You say one of your recommendations is to have a right to choose citizenship.

Mr. MEANS. Yes, sir.

Senator DECONCINI. And I believe you said "absolute," if necessary. Does that mean a forbearance of United States citizenship, and to be only a citizen of the particular tribe to which you belong? Is that what you mean by that?

Mr. MEANS. Very definitely. But I want to qualify that with this.

The inherent fear of non-Indians concerning Indians and what we're going to do—it's like when 50 of us went into the Black Hills of South Dakota to reestablish a spiritual youth camp. Everyone in South Dakota, including the Senator from South Dakota and the other Senator from South Dakota and the U.S. Representative from South Dakota thought that the entire Sioux Nation was going to invade the Black Hills and chase all the whites back into the sea or some such nonsense like that.

What happens is, you will probably be pleasantly surprised—and I would be unpleasantly disappointed—that probably no Indian nation will renounce their American citizenship. There may be a few individuals such as myself that would only choose citizenship in their own nation, but we should have that right. As you so aptly mentioned in your introductory remarks about the Constitution, especially Article VI pertains to Indian people and our treaties.

Senator DECONCINI. If that were to come about, where you had that absolute right, and you or other Native Americans chose that right to renounce American citizenship, then what relation would that individual have? Would they be immigrants in the United States when they are off the reservation? What status would they have legally? Have you thought that out, Mr. Means?

Mr. MEANS. Well, that's for us to determine. That's called self-determination. We certainly wouldn't be an immigrant in the United States, being as we are the landlords, so it's impossible for that to occur.

Senator DECONCINI. I understand your point very well, but the fact is that if someone renounces their citizenship here, they usually take a citizenship in some other country. What you're suggesting is that if somebody did that, they would take a citizenship as a Navajo or a Cherokee or something like that, and then not be a citizen of the United States. Or are you talking about having a dual citizenship, both the rights and the privileges and the burdens?

Mr. MEANS. We could have that, such as some Americans also have that right, like going to Israel or any other nation—Canada, for example.

But what I am also talking about, if we chose to be citizens we would be subject to the same laws of the United States. We would travel with passports. I have traveled internationally on my own Indian passport, as have many other Indian people in this Nation.

I don't think it is a very major obstacle, but we do have the right of citizenship. Understand that we don't—my two younger brothers were not enrolled in the Oglala Lakota because of BIA policy because they were born off the reservation, even though they were born on another reservation. These types of things just add to the regulation and oppression.

Senator DECONCINI. Well, that particular one troubles me because I don't have a thorough understanding of it, but some of your other suggestions do strike a chord with me, that they ought to be pursued—settlement of Indian claims and payment for whatever those judgments might be, if there are judgments.

I have no other questions. I do thank you, Mr. Means, for being here and for being as blunt and as straightforward as you were today, and as you have historically been.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

It's good to see you again, Russell.

Mr. MEANS. Thank you, John.

Senator MCCAIN. We have met from time to time in past years over a variety of issues, including the subject of your efforts for the freedom and independence of some Indians in Central America with which you have been very heroically involved, I might say.

In your efforts to assist the economies of several different reservations which you mentioned that have all failed, could you cite us a specific example of the unhappy experience that you had in these efforts? In other words, a specific case where you tried to go and have a resort or a hotel or some other economic enterprise established, and what happened, so that we can get a better insight into the problems that we have with economic development?

Mr. MEANS. OK, I can give you many. The worst case scenario is with the Lummi Indian Nation. Now, I admired the Lummi tribal government because they have historically butted heads with the Bureau of Indian Affairs and the Federal Government bureaucracy. In fact, they are now immersed in fighting the IRS concerning the attempt of the IRS to illegally tax their fish.

So when I found out through knowledge of individuals on the tribal council that they had a port license—they are the only entity in the Puget Sound area that has a license to build port facilities—their proposal reaches something like around $30 million, give or take. That's not exact. So I was talking with one of their administrative workers who was in contact with the chairman and vice chairman of the tribe. He was in charge of the port facilities. I have a business associate out of New Jersey, and he made contact with the Polish Government. The Polish Government has a joint venture operation with the Americans called Amerpol. The Polish Government has a fishing fleet of 40 fishing trawlers, those great big huge metal ships, in the northern Pacific. They have no port. They are looking for a port. So we had the tribal government of the Lummis fax the prospectus for their port facilities to my representative, and he in turn gave it to the Polish Government. They were totally impressed, very impressed with the prospectus.

I arranged a meeting—a representative from the Polish Government, the chairman of the board of Amerpol, the CEO, and the treasurer of Amerpol, and the Polish Government's representative from Alaska for the northern fishing fleet of the Pacific, headquartered in Anchorage, AK. Those five flew into Bellingham, WA. Before they did so they faxed their arrival and flight data to the Lummis, saying they were arriving—there were arriving that night about 6 o'clock, and would they have dinner with them at 8 o'clock at the hotel where they were going to stay? And would they please pick them up at 8 o'clock the next morning? They would meet for however long it took, and then they would like a tour of the reservation before they left.

These people were coming to talk about joint ventures, private contracting with individual Indian fisherman of the Lummi Indian Nation, making deals with them, and possibly a joint venture in building their port facilities, this $30 million that the BIA has already approved.

Nobody met them at the airplane and nobody showed up at 8 o'clock for the dinner. The next morning my associate calls me from New Jersey. He's got a call from the board chairman of Amerpol saying, "Nobody is there." I looked at the time, and in Pacific time it's 8:20 so they are 20 minutes late. So I figure, "Indian time," what Tom Daschle runs on, Indian time. So I told him, "Don't worry. Give them another one-half hour." They gave them another one-half an hour and nobody showed up. So my associate called the person we had contact with at the Lummi Indian Nation, who was in a meeting. The chairman was fishing—he is a commercial fisherman; he was out fishing, and the vice chairman was in a meeting. The secretaries who answered the phone didn't know anything was going on.

Finally, my associate—because it's our company that is getting egg all over its face—says, "Are you people insane? These people want to talk $30 million in the building of a new port facility. Get over there and pick them up."

So she does. They pick them up. The meeting results—a lackadaisical-type meeting, which is run of the mill on the reservations that I've been associated with, all the different reservations—at any rate, the result was that the Polish Government and its joint venture corporation with American businessmen went away thinking that every Indian in the entire western hemisphere fits all the stereotype images that we suffer under.

That was the straw that broke the camel's back and got me out of Indian affairs. That was just last month.

Senator McCain. Let me ask one more question if I could, please, and that is your proposal for abolishing the Bureau of Indian Affairs.

Let me say that I have heard that on many occasions, including from some of my colleagues here in the Senate and in the House. And in theory, that might be a viable option if we believe, as I think is true in some cases—many cases—that the BIA has been an obstacle rather than a help to Indian development of all kinds. I think a case could be made in that direction. Whether that was intentional or unintentional I think depends on specific cases, and I think you would agree with me that the vast majority of employees of the Bureau of Indian Affairs are honest, dedicated, hard-working people who are bound by policies and in some cases laws by Congress which impede their ability to help Native Americans.

If you do away with the BIA, how do you implement programs, particularly for smaller tribes—as you know, we have small tribes with only a few hundred or less tribal members—how do you implement programs and provide assistance to those tribes in an efficient fashion?

If it's a large tribe, I would suggest that over time it should be fairly easy if we could get the kind of education level and training which is critical. But with smaller tribes I think it would be very difficult, particularly given the eligibility requirements which are laid down by Congress for many of these programs—how do we resolve that part of the problem with dissolving the BIA?

Mr. MEANS. First, your conception of the larger—I think it's the reverse. It would be easier with the smaller nations. The larger nations are the stumbling blocks as proven in Indian affairs when they created the National Tribal Chairmans Association. That was created because the bigger Indian reservations were getting outvoted at NCAI by the smaller ones who had banded together with the urban Indians, so NTCA was created with the sponsorship of the Government so that the bigger reservations would have their own voice and their own little world. Phillip remembers that in Reno.

The smaller reservations, we have our own qualifications. Understand that Indian people—we have no institutions of our own. The schools aren't our institutions. The tribal government isn't our institution. So with all the rhetoric that Indians themselves are guilty of about honoring our elders, nobody does. Those uneducated elders are the ones that were the first tribal governments, who used to impeach tribal chairmen for misusing as little as $40 of tribal monies back in the 1930s. Those elders are the ones, in community by community. It isn't for us to say; it's for the Indian people to self-determine. We have the right to fail. If we botch it, all we have to do is look in the mirror. If we succeed, look in the mirror. We have that right just as everyone else in America has that right. You have the right to fail and you have the right to succeed.

I don't think it's the prerogative of Government to put down a list of qualifications for us. I think the most educated people on an Indian reservation have not been to school.

Senator MCCAIN. Thank you.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator McCain.

Just in response to that thought-provoking question, Senator McCain, I'd like to ask the other members of the panel here if they would care to respond to the question about the abolishing of the BIA.

We are running short of time. If any of you would want to give an observation or opinion on that we would welcome it now or later as the case may be.

Mr. Martin?

Mr. **Martin.** I think we made our point clear earlier, saying that all that money that goes to the bureaucracy should be going to the tribes. I think probably that if you can abolish it, and I know you can, you could also trim it down to a situation where you can get a lot more results than what you are getting now.

Senator **DeConcini.** Would you suggest then that——

Mr. **Martin.** But I don't know about abolishing the BIA. You'd have to take a survey by each tribe. They could tell you.

Senator **DeConcini.** Thank you.

Chief Mankiller.

Ms. **Mankiller.** I would suggest rather a radical streamlining of the BIA, not a total abandonment of the entire BIA. In fact my hope, quite frankly, when I first heard about these hearings was that there would be a serious look at streamlining the BIA. We've had so many hearings and Congress has looked at this issue so many times, and I've testified for the last 20 years on changes that need to be made in the BIA, and it continues in exactly the same form.

So my hope is that you're very serious and that there will be a serious look at streamlining the BIA and modernizing it and making it more responsive to tribal communities.

Senator **DeConcini.** Chairperson Kekahbah.

Ms. **Martin-Kekahbah.** My feeling is—recognizing my friend, Mr. Means, here—is that in his experiences in traveling in numerous countries, as has been mine—for example, I have often found that when we here in the United States label Latin America, we label all of Latin America. We don't divide it up into countries.

I look at the tribal reservations in the same format. We all have varying degrees of development. We are not the same, and I believe Mr. Means pointed that out earlier. As separate nations, we are all different, as Latin American countries are all different. We all have different forms of government, even. We all have different forms of development, of law and order.

So my feeling at this particular time, if there were creativity in the Bureau to deal with the different levels of development of the tribes—there's going to be a time when my tribe will no longer require technical assistance from the Bureau. We will make that determination. However, rather than having it imposed upon us.

Senator **DeConcini.** Do you think a bureaucracy can do that, adjust itself to that many different individualities of the entities of the American Indian tribes?

Ms. **Martin-Kekahbah.** It never has made an attempt.

Senator **DeConcini.** You'd like to see it tried?

Ms. **Martin-Kekahbah.** That's right.

Senator **DeConcini.** Chairman Flett.

Mr. **Flett.** I think abolishment of the Bureau of Indian Affairs at this time—I really doubt if there are some tribes that could be able to function without it at this time. Abolishment totally? No. I think the need is to make it more responsible.

Senator **DeConcini.** Thank you very much. Mr. Means, thank you for being with us, and thank you, panelists.

The committee will stand in recess until 2 o'clock, when we will take up the subject of legal representation.

[Whereupon, at 12:25 p.m., the committee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION—2 P.M.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. The Special Committee on Investigations will come to order.

This afternoon we will examine the adequacy of Federal Government legal representation of American Indians. The United States acts as a trustee for the property rights of American Indians—rights to lands, water, hunting, fishing, and mineral resources.

The Supreme Court holds that the Federal Government's trusteeship for American Indian lands and resources "should be judged by the most exacting fiduciary standard," and that the Government is, again, "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

Whether our Government is fulfilling its trust obligations to American Indians is of central importance to this investigation. As part of its responsibility, the Federal Government, through the Departments of the Interior and Justice, must assure that American Indians are represented in litigation affecting their interests.

America's most noted advocate of American Indian rights, Felix Cohen, took the obligation of legal representation so seriously that he worked tirelessly for 14 years to champion American Indian causes as an attorney at Justice and Interior. Cohen, who wrote the leading handbook on American Indian law, always insisted on the high stakes involved in ensuring proper legal representation of the American Indians. He said, "Our treatment of American Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

Ensuring adequate legal representation of the American Indian has been important not only to Roosevelt New Dealers, like Felix Cohen, but also to modern Republicans. President Nixon, in 1970, made this issue the central focus of his policy Statement on American Indians. President Nixon remains sufficiently concerned about legal representation that he has sent the committee a letter for today's hearings, and I'm going to ask, without objection, that the letter be included in the record.

[Letter of President Nixon appears in appendix.]

Senator DECONCINI. I'd like to take a moment and just read a couple of pertinent points. The letter is dated January 26, 1989, and is addressed to the Senators of this committee.

> I write to commend you and your colleagues on the Special Committee on Investigation of the Senate Select Committee on Indian Affairs for readdressing the important question of whether the first Americans are coming in last as far as the priorities of the Federal Government are concerned.

The former President goes on and lays out some background, and then he says,

> Many of the goals I enumerated in my Special Message to the Congress on Indian Affairs on July 8, 1970, were enacted. I hope your committee will consider one pro-

> posal that was not: my call for the establishment of an Indian Trust Counsel Authority.
>
> I felt then, and I still feel today, that only the creation of an independent legal body can rectify the inherent conflicts of interest facing the Government in representing Indian interests.

The letter is before us, and I will leave it for the record.

The former President goes on,

> In the critical area of administration of their land and water rights, the Indian people deserve to have their interests stated and represented unequivocally. In this as in many other areas, when Washington bureaucrats feud with one another, the rest of the nation loses.

Our witnesses today will present their views on how the legal representation process has worked during the last 20 years. They will testify that the sixties and seventies were an active time of advocacy and affirmative litigation by the Federal Government for the American Indians, as compared to this decade, which saw little affirmative litigation filed on behalf of American Indian causes and even fewer legal accomplishments. The distinction between the two periods is undoubtedly due, at least in part, to the selection of officials for the top positions at the Departments of the Interior and Justice. Yet, many of the problems are also procedural and may well be systemic.

Our witnesses today are: Mr. Leonard Garment, formerly on the staff of the Nixon White House and now a partner at the Washington, DC, law firm of Dickerson, Shapiro, and Moren; Brad Patterson, formerly Assistant Cabinet Secretary in the Eisenhower administration and on the staff of the Nixon White House, and author of the recently published book, "The Rise of Power"; and Robert Robertson, former Assistant to the Secretary of the Interior between 1974 and 1976, currently vice president of the Occidental International Corporation here in Washington, DC. We will hear from these gentlemen in just a moment.

Messrs. Garment and Patterson will appear on our first panel, to present their views of the 1970 Nixon Policy Message on American Indians and to relive with us the highlights of that Administration's accomplishments on Federal Indian regulations.

We later will have Messrs. Chambers and Claiborne comprise the second panel later this afternoon. They will present their perspectives both on their Government experience in representing the Federal Government in its role as trustee for the American Indians, and their view on how the process of legal representation is working today.

Later in the hearings we hope to hear from a number of other individuals, including former Solicitor Generals Archibald Cox and Erwin Griswold, and former Deputy Attorney General and Federal District Court Judge Harold Tyler, Jr.

Today we have not asked for testimony from representatives of the Departments of the Interior and Justice because neither department has granted this committee access to documents involved in American Indian litigation. Despite months of discussion and negotiation, we have not been provided materials from any open or closed cases involving American Indians. Recently Cochairman McCain and myself wrote to Attorney General Thornburgh and Interior Secretary-Designee Lujan to request more expeditious handling of our requests and the ability to examine some of these cases for the perspective, and as this committee will address it, and for no other reason. We are hopeful that that may change before these hearings are finished.

[Prepared statement of Senator DeConcini appears in appendix.]

Senator DeConcini. I now yield to the Cochairman, Senator McCain.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, COCHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator McCain. Thank you, Mr. Chairman.

Let me first state my profound disappointment, speaking as a member of the same party as this administration, at the failure of the Justice and Interior Departments to provide us with the documents that have been sought for these many months. I will explore that issue further if we continue to fail to get the kind of cooperation that I think is necessary.

Let me also say, Mr. Chairman, and to the witnesses: what we are discussing here in this hearing I think is perhaps one of the most important, if not the most important, aspect of Federal/Indian relationship. It should seem obvious to even the most casual observer that if certain Americans did not receive equal representation in their Government, it is virtually impossible for them to obtain equal opportunity.

I think one sentence that Mr. Garment has in his statement sums it up. He says, "What we are seeing is not Indian corruption; it is the corruption that occurs almost universally when Government has too much discretionary power and individuals too little."

I think a case is going to be made here that in the last 10 to 15 years Native Americans have not received equal representation at the highest levels—and, in fact, at all levels—of the Federal Government. I think it is regrettable, but I think this issue has to be very well ventilated if we are going to correct the inequities which were outlined by the chairman and myself and the chairman of the Select Committee, Senator Inouye, at the beginning of these hearings.

I welcome the witnesses here.

Thank you, Mr. Chairman.

Senator DeConcini. I thank you, Senator McCain.

I will now ask Mr. Patterson if he will proceed with his statement. Thank you very much for being with us, Mr. Patterson.

STATEMENT OF BRADLEY H. PATTERSON, JR., EXECUTIVE ASSISTANT TO LEONARD GARMENT IN THE NIXON WHITE HOUSE (1969–74)

Mr. Patterson. Mr. Chairman and members of the subcommittee, my name is Bradley Patterson, Jr. I am a recently retired member of the senior staff of the Brookings Institution. Previous to my 11½ years with Brookings I was a Federal career executive serving first in the Department of State, beginning in 1945, and then as the Deputy Cabinet Secretary at the White House, the Executive Secretary of the Peace Corps, and in various other assignments.

From September, 1969, until November 1974 I served again on the White House Staff, this time as the Executive Assistant to the Honorable Leonard Garment, Special Counsel to the President, and the unsung major actor who was the principal shaper of the progressive policies of that era in civil rights and in Indian affairs.

I stayed on under President Ford, who later formally designated me as the White House aide responsible for the coordination of Indian issues.

It is from the seven years' experience under Presidents Nixon and Ford that I appear before the subcommittee today.

In this effort, I was also a colleague of Ms. Bobbie Green Kilberg who was on John Ehrlichman's staff, and of Mr. Robert Robertson who was on the Vice President's staff. All of us whose names I have mentioned are very proud to have been involved with the initiatives that the President took in those years to improve both the legal and the economic status of American native peoples.

I can sum up my testimony in one sentence, however: presidential initiatives are nearly useless without surveillance and follow-through by the President's staff itself. Why? Because so-called bureaucrats drag their feet in opposition to the president? No, I am not saying that this afternoon. Because even some of the President's appointees are secretly trying to undermine his policies? I am not saying that, either. My assertion is that when the President—any president—does what presidents are uniquely expected to do; that is, enunciate precedent-breaking new solutions to old problems, the very newness, the abruptness of departure from past practice, come as a shock to other executive branch officials outside the perimeter of the White House. "But we've never done that before" is often the dazed and disbelieving reaction—from political as well as career executives.

It was just such a shock which President Nixon administered to his Executive Branch on July 8, 1970, when he issued his landmark Special Message on Indian Affairs. On the administrative Richter Scale it was 9.9. And now, nearly 19 years later, I think I still detect dusty plaster continuing to cascade from old ceilings.

In his 1970 message, for example, the President announced that the old policy of forced termination of Indian reservations was wrong—yet it was not until 4 years later that the Menominees got their reservation restored, and I believe it has taken 18 years before the Congress finally revoked the 1953 termination resolution.

The President declared that the Indian leaders should be "participating in policy development to the greatest possible degree." But it took unremitting White House staff pressure on both OMB and the Department of the Interior to reopen the Alaska Native Claims issue in 1971, to invite Alaska Native leaders, themselves, to give us their views and to re-write the proposed legislation to reflect those views. Incidentally, I salute the Congress for its thorough yet prompt action in approving the Alaska Native Claims Act within a year after the President sent it forward.

I want to pay special tribute to Messrs. Robertson and C.D. Ward of the then vice president's staff—they from their office, and we from ours, joined efforts to keep the president's proposals on track.

Perhaps the best example of the need for diligent surveillance and follow-through after a presidential initiative is found in the specific policy area in which this subcommittee today is interested: the measures to guarantee to Indian tribes the special protection of their treaty and trust rights.

What did the President say in his 1970 message? He quotes it in his letter in front of you.

Then the President proposed some special new machinery "to assure independent legal representation for the Indians' natural resources rights."

That special machinery—the idea of an Indian Trust Counsel Authority—was not then, and still has not been, instituted, but as soon as the message was issued, the duty fell, in the interim, on the group of us presidential and vice presidential staffers to find some way of guaranteeing that in any proceeding where Indian trust rights were under challenge, the voice of the Federal Government, as the Indians' legal trustee, would be heard clearly and directly.

The Yakima Tribe, for instance, complained that the long-ago Federal Government mistake of misfiling the treaty map of their reservation boundaries, and then compounding the mistake by creating a national forest where their lands had been, should be rectified. The Forest Service and Agriculture's General Counsel sputtered and shuddered at the thought of rectification, but we insisted that the Attorney General take another look, and on his advice President Nixon gave the land back to the tribe.

The Department of Justice lawyers hesitated at arguing in Judge Boldt's court that the tribes in the Northwest had treaty rights to much of the salmon in Puget Sound. Through some informal but direct conversations we stiffened their spines, and the resulting Boldt decision is one of the landmark monuments to the reaffirmation of treaty promises.

In 1971 the Internal Revenue Service had pursued an Indian named Bryan Stevens all the way to the Ninth Circuit on a tax evasion charge, which, Stevens argued, negated his trust rights. Only when a very quiet but very determined gentleman by the name of Leonard Garment directly reminded them of the president's policy did the Justice and Treasury lawyers reluctantly agree to append to their prosecution brief a statement by Interior giving the Federal arguments in the Indian's defense. That made the difference to the judges; they ruled in Stevens' favor.

That was the same Leonard Garment who drafted the letter John Ehrlichman signed to the Attorney General on February 15, 1972, reminding the Attorney General that the White House wanted any future Justice brief challenging an Indian natural resources trust interest to be accompanied by a parallel brief from Interior upholding those interests.

To his credit, Attorney General Mitchell promptly consummated a Justice/Interior understanding which incorporated the White House initiative. Within two months—and after an amicable luncheon with Special Counsel Garment in the White House mess—Solicitor General Erwin Griswold agreed to apply the split brief procedure even to cases in the Supreme Court.

In 1974 a second Indian tax case with trust rights implications arose, and a split brief was filed, but only after President Ford's White House assistants—then Associate Counsel Ms. Kilberg, and myself—again firmly reminded Justice that the policy of 1970-72 still held.

In this case—*Critzer* v. *United States*—the Circuit Court chided the Justice representatives for what seemed to them the executive's inability to speak with one voice. Deputy Attorney General Harold Tyler thereupon, in July 1976, told the White House that he was going to abandon the earlier policy—a move which the Interior Solicitor, H. Gregory Austin, contested. The Ford Administration was nearing its end at that point, but I call the subcommittee's attention to Mr. Tyler's letter of last November 2 in which, now as a private citizen, he looks back at that controversy and comments: "In hindsight, I would regard Federal Government legal representation of Indian natural resource trust interests as a bit different than most of the types of bifurcated representation which concerned us in 1975 and 1976. Put differently, the peculiar interest of the U.S. Government in Indian affairs may well set this issue apart for special consideration."

I am sorry to note that President Carter's Attorney General, Griffin Bell, cancelled the 1972 understanding. To the best of my knowledge, there has been no officer in either the Carter or the Reagan White House to resist this relapse; apparently we are now back to the old, comfortable but to my mind improper pre-Nixon practice of hiding from any court's notice the trusteeship views of a Solicitor or Secretary of the Interior if they conflict with the Department of Justice's judgment.

Of course it may appear messy for a Justice Department lawyer to present a split brief to a court—messy to the barrister, messy to the bench. In my opinion, however, that is what courts are for: to judge. In Indian trust cases, the Federal trustee's voice must be heard as distinctly as any other Federal view coming from the Justice Department; judges should then not shirk from doing what they are appointed to do: deciding the tough issues.

Until a Trust Counsel Authority or some other mechanism is designed to meet the need of guaranteeing the representation of Indian trust rights, I believe that the 1972 understanding put in place by Attorney General Mitchell at Garment's and Ehrlichman's urging should be reinstated. And, as before, it will have to be policed by an alert White House staff.

One final point about Indian legal matters: just a few years ago a document was brought to my attention which I want to be sure the subcommittee knows about—I attach it at the end of my written statement.

The document is called a "Statement of Policy" and is, in effect, a compact, dated April 19, 1984, among the governors of the States of Arizona, New Mexico, and Utah, and the chairman of the Navajo Tribal Council. It promises government-to-government relationships among the four, provides for close and regular consultation among them, and sets forth their agreement that neither the Navajo Nation nor any of the three States will file lawsuits against one another before they sit down with one another and consult to try to resolve issues of conflict without going to court. I applaud this refreshing departure from the State-tribal polarities of years past, and hope the subcommittee will urge other States and tribes to follow this example.

Let me simply conclude at this point by saying I have other observations in general about Indian affairs from my experience, particularly the fact, Mr. Chairman, that Indian affairs pay no attention to cabinet boundary lines. There are about 52—in a count I made in 1976—different offices in 17 different departments and agencies of the Federal Executive Branch which handled important aspects of Indian affairs. So one ends with the conclusion that you really do need central coordination at the White House, and a great deal of careful surveillance over Indian affairs.

My concluding comment is this: I have watched the morning hearings over C-Span and listened to the statements that you made, Mr. Chairman, and Senator Inouye, and others, and the witnesses this morning. I simply will say that all three of us this afternoon here are sitting here talking to you from the perspective of policy makers at the level of the White House and the vice president's office. But good policy isn't any good without good administration to follow it up. And if administration has been poor or ineffective—and it may be true from the Arizona Republic Series—insofar as that is true, anybody in the policy level, of course, is embarrassed and chagrined and frustrated at poor administration.

I feel confident that the work of this committee will help cast a light on both the good and the bad in administration so that we can correct it.

But from our point of view as policy-makers in the years of the 1970s, we are proud of what we did, and we very much hope not only that the policies will succeed that we began to set, but that good administration will keep them going.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Patterson appears in appendix.]

Senator **DeConcini**. Mr. Patterson, thank you. That's very helpful to give us some of the history and the background here for the record for the purpose of this committee.

I do have some questions, but we're going to listen to the rest of the panel before we go to the questions.

Mr. Garment, do you have a statement for us, sir?

Mr. **Garment**. Yes, sir.

Senator **DeConcini**. Please proceed.

STATEMENT OF LEONARD GARMENT, SPECIAL CONSULTANT TO PRESIDENT NIXON (1969-74)

Mr. **Garment**. Thank you, Senator.

I was frequently bemused during my years in the White House finding myself, a New York lawyer whose roots were on the streets of Brooklyn, attending to Indian affairs. But I did learn a political science lesson from all of that, which is that a person who is ignorant, but of essentially good will, combined with a colleague who is immensely competent and energetic, can frequently find his way through some novel political and governmental puzzles. I was the ignorant one, obviously. But with a certain amount of good will I was fortunate to have Brad Patterson as my colleague, who knew an immense amount about Indian affairs, as he did about every aspect of government, to help me and guide me, and, as is the case today, to set the tone of the little bit that I have to say.

Indian affairs seems to be a little bit like the business cycle—periodically rearing its head and drawing attention. It may be more relevant to compare the periodic interest to the Washington phenomenon of the cicadas that turn up every 17 years, because it is roughly 17 years since we worked on the Nixon reform message. It is about time for the crickets to start their musical sounds.

Seriously, I think that there is the important business of the committee, and there are people that we know—like Bobbie Kilberg and Boyden Gray, and certainly President Bush, who I think all of us have a very strong feeling of confidence about, that they and their colleagues will address themselves to the questions which have been dormant during the past decade and more.

Now, let me read a very brief statement—an annex to what Brad read into the record.

Some of us are here today, Mr. Chairman, to try to complete a vital piece of work begun during the Nixon administration. We are urging that Congress finally implement the idea of an Indian Trust Counsel Authority. In some matters on which the U.S. Government must go to court, the position adopted by the Department of Justice does not take account of the interests and claims of American Indians, but the Federal Government is trustee for the American tribes, and is both legally and morally bound to protect and promote those interests. A Trust Council Authority would insure that, in situations of conflict, the Indians would receive separate U.S. Government representation in the courts.

The Congress, the honorable members of this committee, the American press, lawyers without number, ethics scholars, are deeply, constantly, pre-occupied by the issue of conflicts of interest. I can think of no more important area in which the plea for sole representation and the avoidance of conflict of interest is more important than in the representation of generic, systemic, organic, legal claims involving Indian interests.

In the past few weeks, gentlemen, the press has been paying a great deal of attention to American Indians—but not, unfortunately, to the serious problem of legal representation. Instead, we have been reading about allegations of Indian corruption among some tribal leaders and their cronies and bureaucratic allies in the Bureau of Indian Affairs.

Whenever this issue comes up, some critics point their fingers at the news stories and say, "Look, these are the people to whom you want to give legal independence. They can't exercise even their present limited freedom responsibly, let alone cope with any new grants of power."

The people who say this are profoundly wrong. Whatever corruption may exist here is what happens wherever government is given large amounts of money to dispense, great power over people's lives, and great discretion in using that power, whether it is in a poverty program or a Small Business Administration or the Department of Defense.

What we are seeing is not Indian corruption; it is the corruption that occurs almost universally when government has too much discretionary power and individuals too little.

You can attack this pathology only by giving people more, rather than less, responsibility and a greater, rather than a lesser, sense of their own real interests. It is for this reason as well, and not just because of the clear legal obligation, that the idea of an Indian Trust Counsel Authority is sound and, indeed, indispensable. It is also long overdue.

Thank you.

[Prepared statement of Mr. Garment appears in appendix.]

Senator DeConcini. Thank you very much.

Mr. Robertson.

STATEMENT OF ROBERT ROBERTSON, EXECUTIVE DIRECTOR, NATIONAL COUNCIL ON INDIAN OPPORTUNITY, OFFICE OF THE VICE PRESIDENT (1969-74)

Mr. Robertson. Mr. Chairman, Mr. Cochairman, it is a pleasure to appear here this morning.

I have no prepared statement, Senator DeConcini, because I had the privilege of reviewing Mr. Patterson's statement earlier, and I join with him in every word of his statement.

But just let me say what a great pleasure it was during that period to have the pleasure and honor of working with Leonard Garment, Brad Patterson, Bobbie Greene-Kilberg and the others, and to have, as bosses, a President and Vice President who truly cared about Indian relationships with the Federal Government, which, after a lot of hard work, resulted in the Special Message of July 8, 1970, to the Congress.

Those were, as you may recall, trying times. From the Alcatraz takeover, wherein I reported to Leonard Garment, and following that abortive negotiated process with the occupiers of Alcatraz through the building takeovers and all of the militant activities that took place, not once in that whole time did I see any lessening of enthusiasm for the work that resulted in the 1970 message or in the follow-up to the essential parts of it, particularly the Indian Trust Counsel Authority work and that basic responsibility of the trustee to the beneficiary.

Insofar as the Trust Counsel Authority is concerned, I join with both of my colleagues in continuing strongly to endorse that. But to go even a step further in the overall relationship of the tribes to and with the trustee, and particularly the relationship with the Bureau of Indian Affairs and the Indian Health Service, and herein I allude to Public Law 93-638, which was the child of President Nixon's July Message, and the subsequent amendments which took place to that very important act in this last Congress.

I may say that even after I left the vice president's office and served under three secretaries of the Interior and then went into the private sector, I have not lost my touch with the American Indians and Alaska Native communities. I have many friends out there and we have many conversations.

For President Reagan, I was cochairman of the Presidential Commission on Indian Reservation Economies, an activity which really, again, was an off-shoot of this July 8, 1970, Message to the Congress from President Nixon.

In the charter for this commission, of which I was cochairman, we were charged with identifying all of the impediments to economic self-sufficiency that exist between the Indian communities and the outside world, whether it is the Federal Government, their own tribal government, State governments, whatever it might be. It is all detailed in this report which was submitted to President Reagan in December 1984.

In reviewing it again this morning, I find that many of the recommendations that were made by this commission still hold water, and in it we allude to the Trust Counsel Authority. We allude also to an Office of Trust Responsibility, an office of 638, if you will—an office which would, under our recommendations, be positioned between the Bureau of Indian Affairs and the principal field trustee, the Secretary of the Interior, to make sure that Public Law 93-638, as amended, is carried out. It is the law of the land.

You folks in the Congress told us what should be done, and, believe me, the statistics that we uncovered—and they are included in part 2 of this report—are an abomination in terms of what programs were turned over and the quantity of those programs that were turned over to Indian people.

So without belaboring the subject I hold myself open to any questions you might have.

Again, Mr. Chairman, it is a distinct honor to appear before you. I commend the U.S. Senate for fielding this select committee.

Senator DECONCINI. Mr. Robertson, thank you. We'd like to have a copy of that report. I presume you don't mind leaving us a copy?

Mr. GARMENT. No, sir.

Senator DECONCINI. I believe it was delivered to President Reagan in 1984?

Mr. GARMENT. Yes; it was in December of 1984.

Senator DECONCINI. Thank you.

[Report, appears in appendix.]

Senator DECONCINI. Mr. Garment.

Mr. GARMENT. Senator DeConcini, just a very brief addition to what I said before. It is a little bit of a plug, but it is not unrelated to what is taking place here today.

Brad Patterson has written—and Basic Books has published—an absolutely magnificent work on the White House called "Ring of Power: the White House Staff and its Expanding Role in Government."

Most of the first section of the book deals with Indian problems and some of the Indian crises as cases for the larger examination of the problems of government and the nature of White House executive power—its inevitability, as well as its problems. I recommend that book to everyone. I have no interest in that book other than the interest of a friend and a citizen.

Senator DECONCINI. Thank you.

Mr. Robertson, going to you first: that report that you mention there, do you know if any of the recommendations have been implemented, to your knowledge?

Mr. ROBERTSON. Very, very little. As a matter of fact, I hate to say this, but this commission never received a formal thank you from the White House for the submission of this report, and eight commissioners worked very hard for about 1 year and a half to pull this together, conducting 17 field hearings involving Indian people. I may say, as a post script to this comment, that the backing or underpinning of all of these recommendations that are made in part one of this report are based on what Indian people told us they wanted, whether it was in the public hearings, in the literature, or in the expert areas.

Senator DECONCINI. Let me thank you for the report, be it presumptuous of me to do so.

Mr. ROBERTSON. Thank you.

Senator DECONCINI. But let me thank you for it, because I remember the commission being created and do not remember the delivery of a copy up here, but I suspect it was delivered to us, as well, and I look forward to taking a look at it.

Mr. Patterson—or any of you—President Nixon, leaving under the Watergate era, certainly doesn't get the credit, I suppose, that he should have for some of the things he did very constructive for this country. Just for the record, can you tell us—because you worked there at the time—where did his commitment come from? Do you know that personally? Where was it? Was it from school? Or was it Indian contacts he had had? Or was it the fact that he was a lawyer? Or just what was it, for the record? I think it would be important for the committee history to have that available if you have comment.

Mr. PATTERSON. I'll try to make a very long story very brief.

In general, Richard Nixon had a larger interest in matters affecting civil rights and the expansion of opportunity for minorities—black, hispanic, Indian—than history has thus far credited him for.

I think we are moving into a time when a certain amount of revision as to authorship is beginning to emerge, and I think in the next couple of years—I know that there are several books by eminent historians that are coming close to publication that will provide a somewhat more balanced picture that was obscured by the events like the anger from Vietnam and the chaos that ensued during Watergate.

I think he had a rather strong sense about the importance to the country of pursuing the expansion of opportunity for minorities that had not gotten a very good shake through their lives, and I think there was a very personal element in that inasmuch as he had struggled to make his way in the world, and I think he had a very basic empathy for others who had to struggle.

I think he also recognized that it was an important part of the maintenance of a civilized atmosphere in the country at a time when—many of us have forgotten—there was anything but a civilized atmosphere coming out of the late 1960s and through the early 1970s. I recall vividly that there was a time when there were sandbags in the executive office building and the National Guard and troops there during the time following Cambodia.

Second, I think on Indian matters—and other matters, including legal services, generally—Richard Nixon did have a strong feeling about the legal rights of persons coming into contact with government. He did have—and it is generally known and he has written about it—a very close and important formative relationship with an Indian named Chief Newman who was his football coach in high school. Although Mr. Nixon was not an extraordinarily successful football player, he did learn a great deal from Chief Newman. I think in his memoirs the former President credits Chief Newman with being the second most important male influence in his life after his father.

So I think that there were these various factors, and——

Senator DeConcini. If I could interrupt you, do you recall how he zeroed in on some of these areas such as the legal representation? Was that presented to him by his staff and brought to his attention as a problem?

Mr. Patterson. Right. These were matters that were presented to us on the staff as important issues, and we examined them, and we followed the usual process of briefing the president. John Ehrlichman was extremely helpful.

Senator DeConcini. You felt comfortable, obviously, that the president, at the time, would take these on and really give you carte blanche——

Mr. Patterson. Yes.

Senator DeConcini [continuing]. Or give you orders to proceed?

Mr. Patterson. Yes; he did. I don't know whether it was carte blanche or order to proceed, but we had no great difficulty understanding each other.

Senator DeConcini. One other question——

Mr. Patterson. Could I just add——

Senator DeConcini. Yes.

Mr. Patterson. Sort of a footnote to what Leonard was saying?

Senator DeConcini. Please do.

Mr. Patterson. One other aspect of a successful policy change, in addition to the president's personal commitment that Mr. Garment described, was an open door which we had in the Nixon White House to all kinds of people on both sides of the aisle who would come in and shake our shoulders, so to speak, and give us new ideas.

There was a gentleman here in town called Edgar Cahn who, with some other associates, had written a book called, "Our Brothers' Keeper." I remember Edgar coming in and, in effect, shaking our shoulders and saying, "You ought to look at this problem." And we did, along with Bob and others.

Some of the people that shook our shoulders included: LaDonna Harris and Fred Harris—Fred was a Senator at the time, and his distinguished wife was a Comanche Indian—she was one of them that shook our shoulders; Bill Veeder, who was behind me in the hall here, a pungent and a dissident in the bureaucracy; the President of the Alaska Federation of Natives came from Alaska and shook our shoulders about the Alaska Native Claims Act; and Phil Martin, one of your witnesses this morning.

So we had an open door with people of different kinds and from all over the country—Senator Goldwater, Fred Harris—two of your colleagues in the Senate—and we listened and we paid attention and we were delighted to have this informal network of communications which helped us implement the president's own personal commitment.

Senator DeConcini. Senator McCain, do you have any questions?

Senator McCAIN. Thank you, Mr. Chairman. And I want to thank the panel again for their very important contributions.

First I would like to comment on the very important document on tribal economies. I did read it at the time that it was completed, and I agreed with a substantial amount of it. I think it is important to point out that that report was not without controversy. There were several major tribal organizations which vehemently disagreed with certain parts of the report; but I also believe—and I disagreed with parts of it—but I think it is important to recognize that that report stimulated a great deal of thought and discussion and, indeed, changed some opinions throughout Indian Country. I think it did make a very important and significant contribution to the efforts that we are trying to make and all of us are interested in, and that is the improvement of tribal economies.

I just really have one question, Mr. Garment, for you or Mr. Patterson: my understanding from the history of this situation is that there was a recommendation made to you and/or Mr. Patterson and the President to establish a Trust Counsel Authority, someone who would speak for Indians when there were matters of dispute, which is also often true where the existing structure of government cannot adequately represent the Indian interests because of a conflict of interest. What happened?

Mr. GARMENT. Well, that's a fair question. Since I have been distracted by other things for the last several years, I asked that question. Whatever did happen?

That was the part of the reform package that fared worst and, in a sense, may have been the most important. To give a fair account, there were many in the Indian community who had divided feelings about the creation of this Indian Trust Counsel. I think they felt it might be too small, that it might be overwhelmed by the other, more powerful bureaucratic organizations, and I think there was a certain anxiety about how this new structure would operate and whether it would be helpful or hurtful.

Second, I think that there was considerable resistance of a professional nature on the part of lawyers. There is nothing like lawyers when it comes to wanting things done their own way, and the very notion of institutionalizing ambivalence by having a brief that presents two points of view was anathema to people in the Justice Department and elsewhere through the Government. I think many of the people in Congress felt that was a bad idea because no particular court is going to know quite what is happening.

And, indeed, that problem was aggravated by—I believe it was the Fourth Circuit Court of Appeals—the Critzer Case, which made some admonitory comment about the fact that the Government didn't seem to know what its own position was.

Well, you have to educate courts as well as the citizenry and the executive legislative branches, because it was complicated to try to institutionalize the way the Federal Government would handle its multiple responsibilities by presenting multiple points of view at the hands of people, each of whom would devote their energies and advocacy skills to presenting the best possible argument.

From the time that I began to think about law and practice law and work in the Government there has never been anything that seemed more important to me than providing adequate representation for people in trouble, and particularly people who were sort of outside the pale of normal society; and, second, providing devoted representation that was not hampered, weighed down, made uncertain by reason of some other interest.

Senator McCAIN. And this is still your conviction?

Mr. GARMENT. Yes; indeed, Senator. I think I don't belittle the fact that there may be problems, but I think the principle is sound. There is no real alternative. Whether an Indian Trust Counsel Authority should exist as a separate entity or whether it should be part of the Department of Justice or the Department of Interior—those are matters for expert cognizance and for debate, but the seed should be planted and the work should go forward, and in the fullness of time there will be an entity that will not depend upon episodic and——

Senator McCAIN. Periodic?

Mr. PATTERSON. Periodic interest on the part of a particular administration.

Senator McCAIN. Thank you, Mr. Garment. I hope that this committee and the select committee will give the most serious consideration to this initiative, even if it is long overdue, because I feel it is also a very important one.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator McCain.

Senator Daschle.

Senator DASCHLE. Thank you, Mr. Chairman.

Mr. Garment, I'd be interesting in knowing: in retrospect, where did you find opposition? And to what parts to the policy statement? Where was the most resistance?

Mr. GARMENT. Overall?

Senator DASCHLE. Overall.

Mr. GARMENT. To the whole policy statement? Well, we did pretty well: Blue Lake was restored; the Indian contracting out of self-determination provisions were, in the first instance, implemented; additional funds were appropriated and made available for education and for health services; the policy of maintaining the trust relationship, while encouraging independence—that is, getting away from the notion of termination—that ultimately took some years, reaffirmed by concurrent resolution.

But there were two problems: one is the Indian Trust Counsel. When you get to that kind of vigorous, independent representation in connection with land and water and natural resources, there are very, very important interests that begin to be heard and to dig in their heels. And perhaps I can risk the generalization that this would not be the first time that resistance of that sort has been generated.

The other problem is a problem that Senator DeConcini and Senator McCain have adverted to, and that Brad Patterson has addressed himself to, and that is the problem—and it is a very universal problem—of implementation.

One can't expect the Congress—and even the Executive Branch—to go out into the field and make federalism work. They can have committees on intergovernmental relations, they can work with governors and mayors and all of that, but programs that have their real bite at a very local level—at almost a family level—

and particularly in an area of such complexity where the pathology is so tangled and the problems so historic as in the Indian word, requires something more than simply the enactment of good intentions in the form of legislation, as truly in all the poverty programs.

The Welfare Reform bill has been passed. It is a step forward, but it isn't going to go anywhere until the hard, day-by-day, step-by-step work in the field is undertaken and the idea of federalism is brought to light in some vivid fashion at the grass roots.

Senator DASCHLE. With regard to resistance within the Government, itself—and that's a pretty far-reaching, broad-ranged policy statement—you'd have to run into institutional impediments, bureaucratic impediments that, alone, would be major obstacles to satisfactory implementation. What was your experience in that regard?

Mr. GARMENT. It goes without saying, but it should be said and I appreciate your saying it, Senator Daschle. I referred to it in the briefest way in the page that I read, but the Bureau of Indian Affairs, like many bureaucracies, has its own internal self-interested, self-perpetuating dynamic, and perhaps in a way there is more of a case to be made for the problems encountered here because so large a proportion of the Bureau of Indian Affairs are, in fact, Indians, and they have managed to fight their way into employment and they don't want that to be dissipated. So the normal quotient of bureaucratic interest in exercising power may be even more intensely experienced in the Bureau of Indian Affairs.

Now, I'm not here to say the Bureau of Indian Affairs should be abolished. Some people say, "Off with their heads." I think it should have its role better defined. I think it should be more of a—as one of my colleagues here suggested—a service agency that serves a kind of function similar to that of lawyers: the clients come and ask for help, advice, assistance in arguing the case with other agencies of the Government rather than being what it is now, a vast, paternalistic organization which uses 90 cents out of every $1 for its own administrative purposes rather than getting that money out to the field where it is really needed.

Mr. PATTERSON. Senator, I can give an example. For instance, in Mr. Nixon's proposals was the idea of having teachers in Indian schools become tribal employees responsible to their tribal governments, respectively, rather than be Federal employees. Now, this is several thousand people whose employment status would change from being Federal employees with all the Federal benefits to being tribal employees responsible, as State and local governments are now, to the local school boards. This was a dramatic change.

I don't charge the bureaucracy, so to speak, for being apprehensive about such a change, but it was an important change and it should have been made.

Now I have lost track of how well it has been done, but I think I heard Chief Mankiller this morning say that the Cherokees have taken over their BIA schools. That means, if I am correct, that the teachers on that school faculty now are responsible to the tribe rather than to the BIA in Washington. Great. But that takes some change and makes people apprehensive.

Senator DASCHLE. Thank you all, and thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator Daschle.

I would now ask counsel, Jim Rowe, to proceed with a few other questions, if you gentlemen don't mind.

Mr. ROWE. Thank you. In the recent letter from President Nixon, he reaffirms one statement in his special message, and let me just quote from his recent letter—the section that appears both in the Special Message and in his letter: "Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation.

> No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet, the Federal Government has frequently found itself in precisely that position.
>
> There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists.

At this point in the committee's review we are hearing, not only from this panel, but from the second panel, an overview of the process and whether it is working. We are not asking you today specifically to endorse specific proposals, but I did want to raise one practice that the Nixon Administration implemented and get all of this panel's view on it: the split brief policy which some of you have mentioned in your opening statements. This was an agreement where the Justice Department was asked to state separately the views of the solicitor—the solicitor in the Department of Interior—when the Justice Department conflicted with the view of the solicitor with regard to the Indian rights to their natural resources.

This was done on six different occasions. Coincidentally or not—and there are very strong feelings that this was not coincidental—in each instance when this practice was utilized the originally nonprevailing Indian view at the Department of Interior that was not adopted by the Justice Department was, in fact, put in before the court for review. Six out of six times the Indian position prevailed.

I gather from the three of you that you do not find that coincidental; is that correct?

Mr. GARMENT. That's the kind of crap game you want to get into where the odds work that way. In other words, I don't think it was coincidental, just a roll of the dice. I'm not making any assertion of bad faith, but I do think that many of the people involved in the process of deciding what the position was, had their own predilections—a legal or ideological bias—and that entered into the way they wanted to handle or not handle the case.

When it found its way into the courts in the hands of people who were there to advocate, to present the evidence, to present arguments, those cases came out the way they did.

Mr. PATTERSON. This took very affirmative action from the White House. Mr. Garment is being too modest. There was a meeting that I will never forget in his office with the assistant attorney general for tax and the head of IRS, and they had to be reminded—too polite a word—to do what the President said he wanted done to put that split brief in there. They were just very reluctant because it was such a change from the past.

I don't blame them for being professionally interested in having the Government speak with one voice, but it wouldn't have happened without that intervention from the top.

Mr. GARMENT. This is really a very precise definition of paternalism in relation to Indians. When the Government says we are able, like the father of a family, to administer and sort out controversies among the kids, well, that's paternalism, and that's not law, and that's not proper government.

Mr. ROWE. Your administration, in approximately 1974, following a number of incidents—Alcatraz in late 1969, followed by a BIA takeover on the eve of the 1972 election, and then followed by the Wounded Knee situation—after all of that you still went out and you recruited an Indian advocate specifically to be brought into the Department of Interior to represent the American Indians, and that advocate, not surprisingly, is going to be on our second panel—Mr. Chambers. But, Mr. Patterson, do you recall the thinking in deciding that there was a need in mid 1970s to go out and get an advocate specifically in the Department of Interior to represent the American Indian interests?

Mr. PATTERSON. Well, of course, in the Department of Interior there was a central office, namely the Solicitor's office, which did all the legal work for all the bureaus of the department. BIA did not have its own counsel, as such, so that office was a key office in organizing the Indian representation. We were delighted to have Reid Chambers there, and others on his staff, who pioneered in this.

I might add, incidentally, there was the greatest of ironies that in the very decade which began with the President's message and Bob and Leonard and Ms. Kilberg and myself in the White House taking the lead as we tried to do in Indian affairs, these three instances of Indian uprisings occurred—those guerilla—theatre-like takeovers. It was, in a certain sense, all unnecessary and most of it theatre and all rather unfortunate because it had the effect, of course, of galvanizing opposition and making people feel that there was violence involved.

At the very time that the President and the rest of us were pushing ahead with these new policies the Indian takeovers reflected frustration with the years before. But there was an overlap, so to speak, and the frustration boiled over. We tried to handle those instances with a great deal of restraint, and we were successful in that. But it was an irony to have those two things going on in the same decade.

Mr. GARMENT. The first item on which Brad and I disagree. I think they served a useful purpose because it was messy, but it drew attention—I wouldn't urge it upon anybody within the reach of my voice to do it again because I think it is not necessary, and I'm not sure that everybody would be quite as passive as Brad and I were then—well, I wouldn't say we were passive.

But, in any event, those were important incidents because they did focus attention on the nature of the problem.

Mr. ROWE. Two matters that I wanted to go to: one was the Blue Lake legislation. Could all three of you talk about that and the involvement of President Nixon and Vice President Agnew in that legislation?

Mr. **Garment**. One slightly humorous note: the 74 days of Wounded Knee takeover—and I mean 74 days; every day there was another meeting and there was another crisis and there was another argument for going in with the infantry and sending paratroopers in—it was really quite bizarre. But I must say that I am probably the only man in America involved in Watergate who considered the assignment to Watergate, which occurred at the terminal part of Wounded Knee, to be, in effect, a vacation. [Laughter.]

Now, what was your question, sir?

Mr. **Rowe**. The Blue Lake legislation and the involvement by the President and Vice President.

Mr. **Patterson**. To begin with, of course, the President mentioned it in his message. This has been a piece of land which the Taos Pueblo Indians considered sacred. The Forest Service had taken it over, in effect, years before. The Indians had come to the Indian Claims Commission and said this was unfair. The Claims Commission had said, "Yes, it is unfair. We will give you some money." The Indians said, "We don't want money. We want the land back." They had been pursuing this cause for a long time.

When we took office they pursued it with us, and we and the President felt that this was an injustice and proposed that the land be given back. It had to be done by legislation, however.

The legislation had passed the House many times but had failed on the floor of the Senate mostly because of opposition from the Senator from New Mexico at the time. The White House then put this in the Message and we did some lobbying. We went personally to the Hill up here talking informally to Senator Goldwater and others on both sides of the aisle—a totally bipartisan effort.

Finally we got the bill back on the floor of the Senate and it was amended on the floor of the Senate—in opposition to the Senate Interior Committee's recommendation, which doesn't happen very often, as you know better than I—and amended without a change of a comma from the House-passed version and therefore it didn't have to go to conference, and it was signed.

Bob Robertson and his people helped on this—Bob, you may want to comment on this. We worked very hard.

And then we had a wonderful signing ceremony in the State Dining Room of the White House with the old gentleman Juan de Jesus Romero from the Taos-Pueblo, the Cacique, and others.

Just a footnote here to history: we had written Mr. Nixon's speech of appreciation—there were Christmas decorations up, and so forth, December 1970—the President gave his speech and Cacique gave his and it was interpreted, and then everybody sat down and the President was about to invite everybody to get some coffee and donuts. And then he stopped and got up again and said "I want to add a word." He said, "I am about to go to the Department of Commerce to celebrate the one-trillionth GNP"—and his text is in my written statement, but he, in effect, said, "You know, that ceremony is to celebrate wealth; but today we're celebrating justice." Tears just about came into our eyes because he was so eloquent.

But Bob, you may want to add to my statement about how much work it took. This was a symbolic first success of the Nixon Indian Message.

Mr. ROBERTSON. I don't think there is much that I can add to that, but if Leonard Garment was saddle sore after Wounded Knee he was really saddle sore on a horseback trip that we took up to the sacred lake, Blue Lake, in the Sangre de Cristo Mountains. As I recall Leonard coming back down the hill, we almost had to get a shoe horn to get him out of the saddle. But it was a beautiful experience and, God rest his soul, Juan deJesus Romero, the Cacique of the Pueblo, the guiding light, the strong man of those people, 90-odd years of age was up here in the halls of the Senate lobbying for the passage of that piece of legislation. It was a wonderful experience, and thank God it came out the way it did.

Mr. ROWE. One question on the Yakima Tribe—a treaty question. That was an issue that came to the White House, but it was not just a reactive situation that the Yakima Tribe representatives, as I understand it, came to the White House, and after decades of frustration went into what I would call the open door of the Nixon White House—I think Mr. Patterson has described that in his book: "The Ring of Power: The White House Staff and Its Expanding Role in Government"--and asked for help.

If you could describe that situation as an example of White House involvement that actually lead to a creative solution to a decades-old problem——

Mr. PATTERSON. It was another example, Mr. Counsel, of, as you say, an old controversy. Again, what had happened was that in the Stevens Treaty of 1855, in the set of treaties done at that time, there had been a map describing the boundaries of the Yakima Reservation. The map was sent to Washington and misfiled—lost.

So in 1906 the map was still lost, and President Theodore Roosevelt said he wanted to create a national forest there. The boundaries of the Indian reservation by the treaty went over the summit of Mt. Adams, and part of that beautiful mountain was supposed to be part of the reservation.

Well, because the map was lost nobody could tell the President that he was making a mistake. He, therefore, established the national forest and later I think it became part of a wilderness area, too.

In 1930 they found the map. And then, of course, the Yakimas said, "Wait a minute, we have an injustice here. Please give us back the land." The Agriculture Department said, "No way. The President can't undo the mistake, if it was a mistake. You will have to live with it."

The Yakimas went to the Claims Commission, and the Claims Commission again said, "We owe you some money, and here it is." But the Yakimas rightly said, "We don't want the money, we want the land. The injustice should be rectified by the land given back."

And then we came into the White House. The old issue was presented to us. This time we found that we could get two contrary opinions, through our initiative, from (A) on the one hand, the Solicitor of the Department of the Interior, and (B) on the other hand, from the General Counsel of the Department of Agriculture. Then Leonard took both of these opinions and sent them over to Attorney General Mitchell and said, "Now that we have got these conflicting opinions you render an Opinion of the Attorney General."

It took 1 year. Meanwhile some of us got criticized for "sitting on it" and "doing nothing" quite unfairly. But in a year the Attorney General issued an Opinion saying that Agriculture was wrong, Interior was right, the President could give the land back. Mr. Nixon did so.

Bob, you remember we went out with the vice president's daughter to a wonderful celebration with the Yakima people and their land was restored.

But that's just another little example of how it took time and enterprise and initiative from the center to move these people in the Cabinet Departments.

I'm not saying that the Agriculture General Counsel was a bureaucrat digging in his heels; he was doing what seemed to him professionally right. That's the tragedy of all of this—people think that what they were doing was professionally proper. But they were wrong.

Mr. ROWE. Thank you.

The last point I want to make: in the audience is Mr. C.D. Ward who, with Mr. Robertson, lead the staff work on the vice presidential staff.

Senator DECONCINI. Gentlemen, thank you.

I take it from your testimony here that if you had advice to us here you would enact those recommendations left hanging and not complied with or implemented that you did some 17 years ago, and your arguments are very helpful here.

We thank you for the history that you have laid out here for us. I think it is very, very, very helpful to have that. I thank you for that.

We welcome any other suggestions you may have as these hearings will be going on for some time and we intend to make some suggestions at the end of the process here to the full committee for consideration, and some of that will include legislation.

Thank you.

Mr. GARMENT. Thanks for having us here, Senator.

Mr. ROBERTSON. Thank you.

Mr. PATTERSON. Thank you, sir.

Senator DECONCINI. We will now proceed with Mr. Reid Chambers, the former Associate Solicitor for Indian Affairs at the Department of Interior between 1973–76, and now a partner in the Washington law firm of Sanoaky, Chambers & Sachse.

We will also hear from Louis Claiborne, former Deputy Solicitor General at the Department of Justice, whose tenure in the SG's office started in 1962 and ended in 1985. during which he worked for six different solicitor generals. Mr. Claiborne is now engaged in private practice law and before American Appellate Courts and International Tribunals. He is counsel to the San Francisco law firm of Washburn, Briscoe & McCarthy.

Mr. Claiborne, will you proceed please?

STATEMENT OF LOUIS F. CLAIBORNE, DEPUTY SOLICITOR GENERAL (1964–70; 1978–85)

Mr. Claiborne. Mr. Chairman, Senators, I am honored to be here. I am concerned sufficiently with the problem before you today to be grateful for the opportunity to appear.

During the many years that I was in the Solicitor General's office, with some years away as practicing barrister on the other side of the Atlantic, but still then returning from time to time, my one consistent jurisdiction was Indian affairs.

I was doing all of this in the name of the Solicitor General. As the committee knows, the role of that Solicitor General is to handle the Government's litigation in the Supreme Court on behalf of the United States and to screen appeals when the Government has lost its case in any lower court, State or Federal.

In principle, these Indian cases were a small part of my responsibility, and so it was at the beginning. But at the end, as I shall explain in a moment, they became a larger segment, consuming a disproportionate amount of time and effort—at least so it seemed to me necessary to handle those cases as they deserved to be handled in the Supreme Court.

Perhaps with this background I can help the committee in some small way on the question of legal representation of Indian claims by Federal attorneys. I appreciate that this is only one of the many areas under investigation by the committee, but in my view it is a most important one. You would expect me to take that position, having devoted so much time to it.

But I am concerned that all is not well on this score. The worst may be over for the moment with the departure of certain key lawyers at Interior and Justice. But, as I shall detail in a moment, I believe the problem is inherent in the current process and calls for remedies well beyond changes of personnel.

In my view, one way of stating the problem is that under the pervading system too much depends on officials who have only incidental responsibility for the Indian segment of their jurisdiction. As things are, these officials are not selected for their commitment to the vindication of Indian rights, nor is it expectable that they should be, given all the other responsibilities that they are burdened with. And the changes, accordingly, are that they will have no such special commitment.

Even in the best of climates it will be only by accident that the Secretary of the Interior or the Deputy Secretary or the Solicitor of the Department of the Interior or even the Deputy Solicitor or the Attorney General or the Assistant Attorney General in charge of the Lands Division or his deputies or the Solicitor General or his relevant deputy or any of his assistance will have any special knowledge or sympathy for Indian rights.

And in an administration like that just ended it is predictable that none of these officials will be committed to the Indian cause.

When that is the situation, Indian rights are not represented in the courts by the Federal Government, or are only partly or halfheatedly represented, and sometimes even are opposed by the Government.

Now, it is fair to ask why this matters much, especially when, as is usually true today, the Indian Tribes are separately represented by their own private counsel. Let me suggest why it does matter.

First, litigation is vital to the vindication of Indian rights. Perhaps it is unfortunate that this is so, but it is the reality.

It is so because of the minority status and political impotence of the Indian population and the persisting indifference, even often hostility, to Indian claims.

I need hardly tell the members of this subcommittee that Indian rights are not always conceded by State and local authorities, or even by the State courts, in much of the West. Nor was the attitude more acquiescent in the East or in the South when Indian rights rose up in the form of substantial land claims, whether in Maine, Connecticut, Massachusetts, New York, or South Carolina.

The intervention of the courts, accordingly—especially the Federal courts and the Supreme Court on review of State courts—remains essential to establishing and enforcing tribal rights.

Second, the Federal involvement in such litigation is often critical. In many cases, even today, a small tribe does not have its own lawyers and, indeed, is sometimes unaware of its full rights. But, in any event, it is impossible for any tribe, through its own lawyers, to match the advantages of Federal legal representation.

At their best, the Interior and Justice Department lawyers have the benefit of accumulated expertise, unique resources, and a generous purse—which cannot be matched. Unlike private lawyers, who must sometimes put forward grossly inflated claims, thereby losing credibility with the court, the Government lawyer is much freer to put forward a winnable case.

So, also, the Government lawyers enjoy a unique insulation when an unpopular claim must be asserted and the participation in the name of the United States gives added weight to the argument in court.

In the most controversial cases, of which there have been a substantial number, the courts are emboldened to vindicate the Indian claim by the assurance that the Federal Government will stand behind the decree. Occasionally, as in the Washington Fishery Case, the local opposition to the Indian claim is so virulent that Federal force is required to carry out the decision, just as it was in the desegregation context. Indeed, the court of appeal in that case made precisely that analogy.

Finally, such Federal involvement in Indian litigation is entirely appropriate. This is partly on the principle that Federal lawyers took up the vindication of black rights in the civil rights litigation of the last several decades. But here, in the Indian context, there are, in my view, additional reasons.

The fact is that, unfortunately, even today the United States enjoys unusually pervasive powers over Indian tribes and, correspondingly, owes them a special duty of protection. This is a consequence of historical events in which the United States played the leading, if not always noble, role.

As Cochairman McCain recited this morning, it is a consequence of that history, reflected in the Constitution, itself, in treaties with the tribes, in agreements between the United States and the tribes after the treaty period ended, and in Congressional legislation—

with some lapses—for 200 years, that this special trust relationship between the United States and the tribes persists. A part of that trust relationship is an obligation to vindicate Indian tribal claims before the courts.

This obligation of trust—or guardianship, as it has been called by the courts—is not an anachronism. All who study the matter know that the tribes still need Federal protection, and especially so in vindicating their rightful claim to exercise governmental powers over non-Indian residents within their territories, and in vindicating their claim to exemption from State taxation and control within those reservations, both for themselves and for those who engage in dealings with them.

Besides, in these and other matters the usual adversary is the State, and the tribe would have an ill-matched contest with the lawyers for the State if they were not supported by the United States.

Now, this duty of legal representation that government lawyers owe the tribe does not mean that they must assert any claim the tribe wishes to put forward. If Government lawyers did that, they would lose the special advantage of credibility they presently enjoy with the courts, thereby disserving the tribe they were purporting to represent.

And besides, Government lawyers advocating Indian rights remain attorneys for the United States. They are not tribal lawyers.

On the other hand, I suggest there is an obligation to put forward every reasonably arguable claim, even if, as a judge, one would reject it. Considerations of economy or administrative convenience cannot play a part in the decision, nor can conflicting governmental interests be permitted to affect the decision whether to initiate litigation to vindicate Indian rights, or defend a suit, or appeal an unfavorable judgment, or support the Tribe's case through intervention or amicus filings.

Nor certainly is it proper to compromise the Indian interest by reducing the claim or watering down the arguments so as to accommodate other Federal clients. Indeed, this is one of the most serious defaults since it may pass undetected, and the Supreme Court has long held and only recently re-affirmed that in such cases there is no remedy once the judgment has been entered.

The conflict problem is, of course, the problem that led President Nixon to propose the establishment of an independent Indian Trust Counsel. It is the problem that, for a time, spawned the divided brief practice of which you just heard.

The Supreme Court has stressed that the multiple, and sometimes conflicting, clientele of Government lawyers is a consequence of Congressional decisions to assign all Indian affairs to one Department of the Interior and to assign all litigation to a Department of Justice—the Department of the Interior having many other responsibilities assigned to it by Congress; the Department of Justice having responsibility to represent other Government interests beyond those of Indian tribes.

That, in my view, is the court saying to the Congress that the ball is in your court. It is not a matter which we can resolve.

Now, various remedies have been suggested, and no doubt others will be advanced in these hearings. What I want to stress immediately, however, is my view that the conflict problem is not satisfactorily solved by saying to the tribe, "We can't represent you, but here are the funds to hire yourself your own lawyer."

Congress moved in this direction starting in 1966 when it opened the door to the Federal courts to the tribes suing on their own, and implemented existing provisions of law by funding the hiring of private attorneys by individual tribes.

But, while important, this, I suggest, is not an adequate substitute for representation or support by Government lawyers. Self-representation, without a second from the United States, robs the tribes of all the advantages of Federal participation which I have just recited. And, indeed, in light of past practice it suggests to the court that the tribal claims, in the Government's eyes, is frivolous.

Here I should note the long-established practice of filing amicus curiae briefs in support of tribal claims, a practice which has existed in the appellate courts and in the Supreme Court over several decades. I daresay that those briefs have importantly shaped the development of Indian law over much of that time.

In many cases, the United States and the tribe are both parties because the case was initiated by the United States and the tribe intervened. And here, also, for the United States to drop out, even though the tribe is free to pursue the case, sends a signal which is bound to influence the court. Indeed, it will be a very rare case in which the tribe's lawyers are so good and the case is so obviously winnable that Government participation is entirely superfluous.

Under the prevailing arrangements, it is not difficult to see the many ways in which the Indian interests may suffer. One possibility is that the tribal claim may go unasserted because it never reaches the lawyers at all, having been administratively buried. This apparently happened in respect of the reserved water right of the Pyramid Lake Tribe of Nevada in respect of the water required to maintain their fishery.

Many years ago, when the United States was seeking an adjudication of water rights in the Truckee River and is the only source of water for the lake—which feeds Pyramid Lake—for the first Federal project under the Reclamation Act of 1902, the Newlands Project, a small amount of water was claimed for irrigation of the Indian reservation, but nothing to maintain the fishery, even though these Indians then and since depended for their livelihood upon the fishery. How could that default have occurred?

Even then, in 1922, as is almost always true, there was someone somewhere in the Federal bureaucracy who saw the right course, but he had a lonely and subordinate voice and he was overruled. According to some of the evidence, apparently accepted when the matter came before the Supreme Court some five years ago in an unsuccessful effort to re-open the matter, it was the Acting Commissioner of Indian Affairs, himself, who decided not to pursue the claim for fishery water. He was of the old school that believed that Indians should be civilized by being turned into farmers and weaned away from dependence on hunting and fishing.

One would not encounter quite that attitude today, but there are still some very paternalistic officials in both the Interior and Justice Departments who feel that they know best what is good for the Indian and, to some extent at least, shape the Indian claim accordingly.

A more serious continuing problem is the situation I have already mentioned in which the United States has conflicting interests. That was true in the litigation affecting Pyramid Lake. From the first, it was recognized that if all the water sought for irrigation by the farmers of the Newlands Project were recognized and were diverted for that end, there would not be much left over for the Indian fishery. And so it was decided, in the words spoken at that time in the 1920s, "to prefer the larger interests involved in the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." And so the Indian claim was laid aside.

But that attitude, unfortunately, is not confined to the 1920s. It was echoed as recently in my experience as 1981 in a letter from Senator Laxalt of Nevada to the Attorney General of the United States urging against an appeal in the same Pyramid Lake context which I was urging upon the Solicitor General partly in the interest of the Pyramid Lake Tribe.

The Senator was asking that the attorney general direct the solicitor general to give preference to the interest of, as he put it, "all those ranchers who are ours." I'm glad to report that the then solicitor general, Rex Lee, stood firm and, notwithstanding, appealed.

And, even more recently, I am told the solicitor of the Department of the Interior articulated the proposition that the United States has a trust obligation to the people of the Western States—the non-Indian people of the Western States—that overrides its duty to the Indian tribes—this in arguing against filing an amicus brief supporting a mineral lessee paying tribal severance taxes who was claiming exemption from duplicative State severance taxes. In this case it appears the subsequent solicitor general did not resist that suggestion.

But even more common than these instances of straightforward conflict of interest is the situation in which the official who makes the decision affecting Indian interest who is not hostile but simply unsympathetic to Indian rights. Now, the cause of that may simply be his ignorance of Indian law or of the special relationship owed to the tribes.

There is, for instance, a recurring tendency to treat a recommendation by the Indian Service as no more entitled to preference than one advanced by the Reclamation Service or the Park Service or the Bureau of Land Management. That attitude prevails, I am told, today, at the Interior Department.

But the same attitude has pervaded the Land and Natural Resources Division of the Department of Justice. It is no wonder, when Indians are labelled one more natural resource, the division in the Department of Justice being called, "The Division of Land and Natural Resources," on a par, but no higher than, land and minerals and trees. This, of course, ignores the special obligation due to Indian tribes as distinct human and political communities.

What is more, officials who indulge in that indifferent attitude towards Indian claims are disregarding policies laid down by this

Congress—a policy of promoting self-determination, a policy of continuing the trust relationship between the United States and the tribes, and a recognition of the continuing obligation to promote Indian rights through litigation and otherwise.

Now, often enough ignorance of the law accounts for this wrongheaded attitude, as I said. But sometimes it is a step beyond innocence. The official—and perhaps especially a lawyer—will be resistant to the idea that Indians should enjoy what is, after all, a very remarkable legal status. Many officials without experience of Indian affairs are tempted to invoke Justice Bradley's dictum about the black man: that he should "cease to be a special favorite of the laws and take the rank of a mere citizen." Needless to say, Bradley was premature in saying that in 1883, and so are those who quote him today in respect to the American Indian.

This is not a matter of political allegiance. It may be true that the championing of Indian rights by Federal lawyers is least likely in a very conservative political climate, but ever since Andrew Jackson on the one side, and Chief Justice Marshall on the other, were in opposition with respect to Indian claims, it has been clear that on either side of the aisle one can find those who support and those who ignore Indian rights, without preferring one time to another.

In my experience, Indian advocates are made, not to the manner born. It takes education to accept the propriety of recognizing the unique status of Indians and Indian tribes, and it takes time—frequent, intensive exposure over a fairly long span. In the nature of things, one cannot expect understanding of Indian law and commitment to Indian rights from officials who deal only very occasionally with Indian matters and remain in office only a relatively short time. I may say that I did not come to a commitment to Indian rights without having to be educated, and over some period of time.

But this is all the more true of an attorney general, secretary of the Interior, solicitor general, and, to a lesser degree, their principal assistants, who, by definition, are unlikely to have this special understanding and commitment, and whose role is such that Indian affairs will only play a very small part in their energies and efforts.

In practice, therefore, these officials at the head of the departments are likely either to defer somewhat blindly to the Indian experts in their respective departments or, on the contrary, to overrule them almost automatically. I have lived through both of these extremes.

There have been times when the Interior Department would endorse almost any Indian claim, however frivolous under settled law, and when the Lands Division of the Department of Justice was not sufficiently screening Interior's requests to initiate or support lawsuits on behalf of tribes. More recently, on the other hand, I have experienced the opposite problem: the Interior Department forwarding no recommendation for vindicating the Indian claims, the Lands Division reluctant to act in the absence of such a recommendation, and, if the case involved an appeal or Supreme Court litigation, the solicitor general concerned that his role was not to initiate filings which no agency was urging.

In my last years as deputy solicitor general I therefore found myself expending disproportionate energy first persuading the solicitor general to ignore the silence of others in the Government, myself soliciting advice under the table from the suppressed Indian advocates at Interior and Justice who still remained there but who were not officially permitted to communicate their views to us, and preparing Supreme Court briefs on my own, ultimately fighting all manner of sniping before they were eventually allowed to be filed. That is not how the system is supposed to work. Unsurprisingly, I have noticed, since my departure, that the filing of amicus briefs by the United States in support of Indian claims have measurably dropped off, and perhaps also that the support of appeals in the lower appellate courts has suffered.

To outline the problem naturally leads to the question: what, if anything, can be done to resolve it? I am very far from being sure what the right solutions might be. But very tentatively I do suggest that one possible solution is to establish two or three high-level positions within the Government with officials whose sole responsibility is the vindication of Indian rights. I am inclined to resist the creation of a wholly separate Department of Indian Affairs, but I would advocate the establishment of more prominent, more visible, more independent Indian rights divisions within both the Interior and Justice Departments.

One possible arrangement within the Interior Department would be to give the Indian Division—a perhaps streamlined, reshaped, and renamed Bureau of Indian Affairs—an autonomous status subject only to the secretary's presumably very occasional intervention, and to assign to that agency a lawyer wholly independent of the solicitor of the Interior Department who might be called an Indian Trust Counsel, but who, at all events, would be free to send his recommendations to the Justice Department without any supervision or screening from the solicitor's office.

So, also, within the Department of Justice, itself, I suggest it might be appropriate to create a new Division of Indian Affairs with its own assistant attorney general, quite separate from the Land and Natural Resources Division. That new assistant attorney general for Indian affairs would submit his views directly to the attorney general and to the solicitor general.

The object of the exercise, as I have suggested, is to create these high level offices dedicated solely to the vindication of Indian rights, which must be filled by knowledgeable persons committed to the Indian interest. Merely reorganizing the Government will not work unless the right people are chosen; but at least the modest restructuring I suggest would expose the nominees to these positions— nominees, I would suppose, requiring Senate confirmation—at the hearings on their confirmation to be tested as to their understanding and commitment to the Indian.

I would add only one further point, which is that, I think, rightly prominent among the reforms urged by the Indian tribes and their lawyers is the suggestion that even if one had separate lawyers within the Government who advocated the Indian interests there would come cases—and rightfully so — in which a Secretary of the Interior, an attorney general, or a solicitor general would determine that, in his view, the Indian claim was without merit and he would, accordingly, instruct the Federal lawyer not to represent the tribal interest or even to advocate another conflicting claim.

Now, in those circumstances it seems only right that there be full and timely disclosure to the tribe and its lawyers, that time be afforded to the tribe to represent itself, whether by way of initiating litigation or intervening in litigation or pursuing an appeal that the Government had determined not to pursue, and, finally, to provide funds for that tribal representation to go forward. I'm not sure that this requires new legislation, but one way or another it seems to me the principle should be more firmly established.

Mr. Chairman, I would be happy to answer any questions the committee might have.

[Prepared statement of Mr. Claiborne appears in appendix.]

Senator DeConcini. Thank you, Mr. Claiborne.

Let's hear from Mr. Chambers now, and then we do have some questions.

Mr. Chambers.

STATEMENT OF REID PEYTON CHAMBERS, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS (1973-76)

Mr. Chambers. Thank you, Mr. Chairman. And thank you for the honor of inviting me here today.

Between 1973 and 1976 I served as the Associate Solicitor, which was the chief Indian legal officer within the Interior Department. Since then I have been in private practice here in Washington, DC, representing Indian tribes and tribal organizations. So my comments over this period of about two decades reflect both Government service and private practice.

I am convinced that lawyers within the Government agencies who have responsibility for Indian affairs should function solely as advocates for Indian rights.

I think that is both a legal imperative because of the trust responsibility, and I think it is a moral imperative. I think that it speaks of simple faith to the oldest of American values—fairness, decency, and honor in dealing with the American Indians.

The President put it well in his inaugural address. He used these words: "Great nations, like great men, should keep their word." Now, that was first said not by President Bush—although he may not have known that. It came from a Supreme Court opinion written by Justice Hugo Black in an Indian treaty case speaking about the performance of the United States. So I think protection of Indian rights echoes American values, as well as American legal traditions that go back two centuries.

Now, obviously the performance in the Indian field has not always—or even usually—matched that promise. Some of that is because of the conflict of interest that the committee is aware of, and that we have all been talking about this afternoon. You've got the Government agencies that represent both the Indians and conflicting public interests. Now, public policy normally consists of compromising interests and resolving them. But in the Indian trust field that is not a legal or a fair way to proceed because the United States is both representing public policies of various kinds and is a trustee for private property rights of the American Indians. So it is odious for the United States to resolve those kinds of claims against the Indians.

Now, it also happens that promise is not matched by performance even if you don't have a conflict of interests—a Federal reclamation project, a national park, or something like that. You have one million Indians and you have 220 million non-Indian Americans. And so the power and the money in the country, when there is a political conflict, is often arrayed against the Indians.

That is why I think it is so very important to have institutional advocates within Justice, within Interior, and within the White House.

I think there could be no more eloquent testimony than the one given by the prior panel about the great importance of having White House support for Indian rights. That was common in the Nixon and Ford administrations, but since the Ford Administration we have not had a strong, well-placed Indian advocate within the White House to coordinate policy and to be someone that Indian tribes can go to with their needs and get responses within the Federal bureaucracy.

Now, in my prepared testimony—which I'll just summarize here—I tried to set forth the record of my administration, because it is the one that I am most familiar with, in the protection of Indian rights between 1973 and 1976. But I want to emphasize that that record, which I will summarize in a moment, wasn't just mine or that of my dedicated staff that I helped assemble—and some of them existed there before I got there. It predated me some. I think it started in the last year of the Johnson Administration under Secretary Udall. I think my predecessor, Bill Gershuny, carried it forth as an Associate Solicitor. It functioned under Leonard Garment, under Brad Patterson, under the Nixon policy message.

It was certainly carried on by my successor, Tom Fredericks, a Mandan Indian from North Dakota, former director of the Native American Rights Fund. And it was carried on by some of his successors. It has not been carried on, however, in the past few years, and therein lies the problem.

So while I'm going to talk about things I did, it is not intended to be self-serving. It is a long-standing, bipartisan policy, I suggest, Mr. Chairman, of both Democratic and Republican Administrations to protect Indian rights, a policy that spanned nearly two decades but has recently fallen into atrophy, and that creates the serious problems we are addressing here.

Now, in my 1973–76 period we greatly increased the number of cases brought by the United States as a trustee for Indian interests: for Indian hunting and fishing rights, for Indian water rights, to protect Indian land rights, to protect Indian freedom from State jurisdiction. We saw that as our mission and as our charge.

We brought so many cases that after I had been there about a year the Justice Department established a special section within the Lands Division solely to litigate cases brought by the United States for Indians, and that section still exists today. It has about a dozen lawyers working with it.

One way we dealt with the conflict of interest was the split brief, and that has been described. The White House worked out an arrangement with the Justice Department that when the Solicitor of the Interior Department wanted to file a separate view in a court case from that being taken by the Justice Department, he could do so. We filed it six times; we won in six cases—the Indians won in six cases, and the Justice Department view against the Indians was rejected in each of those cases by the Supreme Court or by a lower federal court.

Then we also dealt with what I think of as administrative conflicts within the Department of the Interior, where the Bureau of Reclamation wanted one thing and the Indians wanted another thing—on water rights, let's say, or where the Bureau of Land Management drew a survey to include some lands under its jurisdiction that we thought were within an Indian reservation. Some of these were in your State, actually.

And those administrative conflicts were resolved. Now, we didn't win all of them. I have detailed some of them in my testimony where I think we didn't win; I have detailed some where I think we did win—but there are a couple of important lessons on it.

One is that we were, I guess, the chicken in the foxes' lair. I mean, you say, "Why put the Indians in there with all the foxes—those strong elements in the West that are going after their interest?" Well, if you are in the fox lair, you know what the fox is doing: you can appeal to the fox, you can argue with the fox, you can fight with the fox. We weren't sitting chickens or sitting ducks, we fought. And we usually won. I think we usually won because I think we had stronger cases, just like we won the six cases where we filed the split briefs, and just like most of the cases that we brought—and some of them are still being litigated—most of the cases have been won by the Indian interests in the past two decades when the United States has brought those cases. Not all of them. I guess if we won every case in a law reform area we wouldn't be bringing enough cases.

But most of them are won because I think the second lesson is that when you have an institutional advocate and the advocate is advocating for Indian rights within an institution—be it the Interior Department, be it the Justice Department, be it before the courts, be it before the Congress—usually the advocate is successful because the rights go back in history and are deeply prized in American law, and are ancient rights and are important rights, and they are usually vindicated.

The danger comes when those rights don't get advocated within the Federal Government, and I think that's the situation that we face today.

I want to make another point about being the chicken in the foxes' lair. Mr. Garment referred to this a little bit in his comments on the Indian Trust Counsel. I was a great supporter of the Indian Trust Counsel when I was a law professor in the early 1970s. I ceased to be one when I saw that you could effectively accomplish the same things within the Federal agencies. If you had strong advocates within Interior and within Justice you could accomplish those things, and you didn't have to be an Indian Trust Counsel on the sideline somewhere just bringing cases. So I think the important teaching about the conflict of interest is that sure it exists, and sure it is terrible, but often you can overcome it by strong advocacy and by winning.

I would urge the committee that if you establish an Indian Trust Counsel, give some thought to including that agency, as Louis Claiborne is suggesting, within the Justice Department, within the Interior Department, because that is where the action is in Indian affairs.

Now, Mr. Chairman, in the last few years this kind of institutional advocacy has been largely absent within the Federal Government, and I want to report to that just briefly.

First there is a telling absence of new, affirmative cases being filed by the Justice Department to protect Indian rights. That isn't something that has happened within the last several years. Now, this is because largely, I think, the Interior Department does not refer those cases to the Justice Department as it did when I was Associate Solicitor and as it did throughout the period my successors served as Associate Solicitor. New cases are not going over. The special litigating section of the Justice Department is still trying the cases that were referred over before, and I think is trying them largely capably. But they are not bringing new cases.

I detail in my testimony some earlier testimony I gave before Congressman Yates over on the House side when he held some oversight hearings just after the Arizona Republic articles came out. Congressman Yates called the Secretary and Solicitor and Assistant Secretary before him and to account for their stewardship. He asked the Solicitor why they weren't bringing cases, and the Solicitor said something like, "Well, people aren't asking us to bring cases." That seems like a lame excuse to me. We never had to be asked. We were asked, and when we were asked we usually did it. But we also went out and tried to initiate cases and find cases to expand the law.

But, after that hearing, I met with the Solicitor and I asked him to bring two cases on behalf of one of my clients, the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I sent him letters more than a year ago—hand delivered one of them myself, at the meeting. In one of the cases, about a year later I got a letter back declining to bring the case. By that time we had entered into a favorable settlement of that case. On the second case I still haven't heard anything from him. It has been 14 or 15 months.

So I think the Interior Department is not actively_supporting Indian cases. These were not marginal cases. The Indian rights are being vindicated. In fact, in the second case we have already won in the meantime in the Federal district court in Montana. The railroad that is our adversary is appealing it to the Ninth Circuit, but we just haven't heard anything back from the Solicitor on this request.

So I think Interior is not referring cases over to Justice, and everything I hear about the Interior Division of Indian Affairs now is that they are not being allowed to function as an advocate within the department.

Now, the second item—and this may be even more serious—is the matter that Louis Claiborne referred to: there is an absence of filing friend of the court briefs in the Supreme Court now. When I was Associate Solicitor, this was done in virtually every Indian case by the Justice Department supporting the Indian position. I detail that in a footnote in my testimony, and, of course, I'm not going to go through the individual cases. But that was the common practice. Louis can tell you it became the common practice somewhat before I became the Associate Solicitor and it continued through Democratic Administrations and through Republican Administrations. It has not continued in the last 2 or 3 years.

Case after case is now argued before the Supreme Court where the United States is not taking a position at all on an Indian case, and that is a very serious danger for Indian rights because, as you know, it is not always true that the lawyers advocating cases in the Supreme Court are the best advocates. It is whatever lawyer handled the case, usually, in the courts below.

But Louis Claiborne and his colleagues—my partner, Harry Sachse, when he was in the Solicitor General's Office—those people are among the most skilled appellate advocates in the country. When they appear before the Supreme Court in an Indian case or any other case, they are listened to by the Court, and their arguments are almost always the best arguments that can be made. It is a great loss for Indian rights not to have that advocacy before the Supreme Court.

Now, the third item is the White House advocate. When I was Associate Solicitor, Brad Patterson and Leonard Garment were in the White House fighting for Indian rights, harmonizing policy of conflicting agencies within the Government. That continued during the Ford Administration. Dr. Ted Marrs succeeded after Mr. Garment and Mr. Patterson—I guess Mr. Garment left and Mr. Patterson went to other duties. Doctor Marrs was there for a while, and then Bobbie Greene Kilberg, a very skilled—like myself, at that time—young lawyer, was in the White House in an advocacy position. And having a White House advocate continued until the end of the Ford Administration, but it has not really been in place since. Indian tribes need that. The Government needs that to discharge its trust responsibility. You have eloquent evidence before you this afternoon of the things that can be accomplished with that arrangement. So that is a last important change that I strongly urge upon you from my years in practice and my years in Government.

I thank you for the honor you do me, Mr. Chairman and Mr. Cochairman, in inviting me to appear before you today. I'd be happy to answer any questions.

[Prepared statement of Mr. Chambers appears in appendix.]

Senator DeConcini. Thank you, Mr. Chambers and Mr. Claiborne. Your testimony is very helpful, and in reviewing it I, first of all, conclude myself that if you have an aggressive Secretary and Solicitor who want to proceed with these Indian rights cases—whether they win them or lose them, they believe they are important and should proceed with them—it happens; and if you don't, it doesn't. That leads me to the conclusion that you make a very good argument to set up a separate—assuming you could pass such legislation, and I'm not saying that would be easy—independent Trust Counsel. Because your argument is that it is better to be inside the chicken coop with everybody because you can fight and try to do it. But if you don't have the encouragement from the Secretary or the Solicitor then, it doesn't happen.

In the meantime, assuming there is validity in your clients' cases, and I'm sure there is, or anybody else's case, it doesn't happen.

So, therefore, isn't it logical to think that if you had a separate, independent office that could come to the conclusion, even though they had to derive their information outside of the bureaucracy of the Interior Department, that if a case should be filed, and that notwithstanding what the political ramifications were of western interest or maybe the Attorney General, the case is going to be filed?

Mr. CHAMBERS. Let us have our cake and eat it too, then, Senator. I think that the——

Senator DECONCINI. Tell me how to do that. I'm interested in that.

Mr. CHAMBERS. I have an idea on it, but it is just an idea that I actually came up with after reading Mr. Claiborne's testimony over the weekend.

I was originally a supporter of the Trust Counsel. Then, when I saw things working within the Government, I thought, "Don't fix something that's not broken." Now, sadly, it is broken again.

What if a Trust Counsel were set up within the Justice Department and within the Interior Department. It could be an advice and consent appointment; it had to come up here so you had oversight on it being an Indian advocate, and that a person with experience in Indian affairs needed to be appointed for that position. Suppose this official had independent authority—if he or she was rolled within the Department of Justice or within the Department of the Interior—they did have independent statutory authority to go into court, to file a split brief, to intervene on behalf of an Indian tribe—whatever was necessary to protect the Indian right—so that the Indian interest would be——

Senator DECONCINI. Excuse me. You're saying that even the attorney general could not reverse that if they decided that a case should be filed?

Mr. CHAMBERS. Well, I think so.

Senator DECONCINI. It would certainly take legislation.

Mr. CHAMBERS. It would certainly take legislation.

Senator DECONCINI. Yes.

Mr. CHAMBERS. And I don't have it all thought out. There was something called the Board of Indian Commissioners in the 19th century—even I and Louis haven't been in this business—that long—but the Board of Indian Commissioners existed around the turn of the century as an independent entity within the Government. I'm going to do some reading on this, but I just haven't thought about it enough. I'll report back on it.

Senator DECONCINI. You're kind of getting to the same thing.

Mr. CHAMBERS. Yes, sir; but don't take it outside of Justice and Interior. Don't do that, because if you do that then those agencies will be free to advocate the anti-Indian position in every case and leave it to the Trust Counsel to advocate the Indian position.

Senator DECONCINI. Yes.

Mr. CHAMBERS. And the Trust Counsel won't find out what's going on, because you find out what's going on inside that agency and you influence it inside, and in most of the cases when you're fighting inside you usually win.

I worked for two solicitors. I don't know that they came to their jobs, any more than Mr. Claiborne came to his, with a background in Indian affairs or any particular predilection, but they were lawyers and they listened to the arguments and they ruled fairly on them. I think most solicitors will do that.

Senator DECONCINI. Mr. Claiborne, just out of curiosity, when you served as solicitor there what influence, if any, did letters or calls from Members of Congress have as to attempting to persuade you to move in a direction to file or not file?

Mr. CLAIBORNE. Mr. Chairman, I must say that with the exception of a letter from the Senator I referred to, which was not addressed to me or even to the solicitor general but to the attorney general, I never received any direct communication from any Member of Congress suggesting that we take this or that position. It is not to say that such representations weren't made to the attorney general, who sometimes asked us to take another look in light of representations that had been made to him.

But I never felt that there was any impropriety——

Senator DECONCINI. I'm not suggesting impropriety at all; I'm suggesting just out of curiosity.

Mr. CLAIBORNE. I don't think that was a very continuing problem, nor do I think it substantially affected the decision in any case of which I am aware, including the one to which I referred in which the decision was not, in the end, influenced by the Senator's intervention.

May I, Mr. Chairman, say a word in support of Mr. Reid's answer to your previous question? I feel rather strongly that it would be a mistake to establish a wholly independent Trust Counsel for Indian Affairs for most of the reasons already given by Mr. Chambers, one of which is that it loses the Department of Justice and the Department of the Interior too easily from their own trust obligation to vindicate Indian rights.

But it downgrades Indian right representation in the courts because, invariably, the independent Indian Trust Counsel cannot have quite the statute of the attorney general or solicitor general of the United States. He will be speaking a minority voice, not the authentic, sovereign voice of the United States, which presumptively will be represented by the solicitor general or the attorney general. And, in a way, it diminishes the effectiveness of Federal support of Indian claims.

Whereas, if you do upgrade within the two departments the lawyers whose duty it is and whose sole duty it is to advocate Indian rights within their own department, but to communicate freely to each other without any screening—and this I take it to be most important in the communication from this Interior Trust Counsel to the Department of Justice, because that is really where the major problem comes.

I share Mr. Reid's optimism that if, at that level, there is a competent, educated, trained lawyer whose sole duty it is to represent Indian claims, his voice will be heard and will not be overruled by the secretary or attorney general.

Senator DECONCINI. I think Mr. Chambers went further, perhaps—don't let me put words in your mouth—that statutorily you might give that person the right to go ahead and file a split brief even if——

Mr. CHAMBERS. Or a separate case if he had to.

Senator DECONCINI. Or separate the case even if the attorney general didn't agree.

Mr. CLAIBORNE. I would have to——

Mr. CHAMBERS. That would be an unusual situation, but I think if it happens——

Senator DECONCINI. Don't you really need that if, for nothing more, to make it appear that there is going to be truly legal representation?

Mr. CLAIBORNE. Well, Mr. Chairman, without having fully considered it I would tend to disagree with that final point which you correctly understand Mr. Chambers to advocate. I would not find desirable a renewal of the split brief practice, even in the rare case. I think that very rare case in which the Secretary of the Interior overrules the Trust Counsel, or the attorney general does so, will be a case in which the Indian claim is truly without merit. But even then, as I have suggested, for fear that it might not be so there would be an obligation first, to reveal this to the tribe, and second, to afford them opportunity to obtain counsel of their own choice, and thirdly to fund that representation. But I would handle it in that way.

Senator DECONCINI. I didn't want to put words in your mouth, Mr. Chambers.

Mr. CHAMBERS. No.

Senator DECONCINI. But you kind of floated that out there as a possibility.

Mr. CHAMBERS. As I said, I haven't—I thought it out completely. I guess that when you've changed your mind—you know, I started out supporting the Trust Counsel and then I changed my mind against it—I think I have become persuaded, given the events of the past couple of years, and particularly given Mr. Claiborne's advice to the committee in his testimony, that something needs to be done. On exactly what it is, I think both of our views are tentative. But my tentative view would be that the split brief was a good idea, and I know Mr. Claiborne has different views about that.

Senator DECONCINI. Senator McCain.

Senator McCAIN. Thank you, Mr. Chairman.

All of us change our minds from time to time, Mr. Chambers.

Mr. CHAMBERS. I've certainly changed mine, Senator.

Senator McCAIN. To your knowledge, what presently is the White House's structure? Who is the advocate for Indian issues within the White House?

Mr. CHAMBERS. I'm hoping that Bobbie Greene Kilberg, whose name has been mentioned——

Senator McCAIN. There is a designated person who is advocate for Indian affairs within the White House staff?

Mr. CHAMBERS. Not at the present, sir. No. There is no one we can go to, but we're hoping that that will come about.

Senator McCAIN. Has there been?

Mr. CHAMBERS. Not since the Ford administration.

Mr. ROWE. For the record, in the most recent presidential message of President Reagan he did call for there to be representation for the American Indians in the Intergovernmental Affairs Office, but I gather from testimony of Mr. Chambers that nobody in that office has taken the ball to be the person to contact on American Indian issues.

Mr. CHAMBERS. Certainly not at a level where it would be effective. I think, practicing law in Washington, I would know of such a person if there were someone like Brad Patterson or Ted Marrs.

Senator MCCAIN. In the Ford administration was it a—or the Nixon Administration—a title, or was it just a person you knew was an advocate within the White House who you could turn to on Indian issues?

Mr. CHAMBERS. I think it was the latter, Senator McCain. I don't believe there was anyone that had the title. You just knew to go to Brad Patterson, and you knew Brad would get things done, and you knew, after he left, that Ted Marrs would, and after that Bobbie Greene Kilberg. And Indian tribes knew. These officials went around to the meetings around the country. I remember Brad and Ted going to NCAI meetings, for example. I remember going with them. They were well known in the Indian community. There's nobody like that now.

Senator MCCAIN. I believe in the White House there has always been—modern days—a person who is sort of responsible for "minority affairs." I think there has always been one of those. I think you are making the case—and the situation regarding Indians makes the case—that perhaps so we don't have to depend on the vagaries of who is appointed to what administration that a person should be designated within the White House staff to handle those issues. Is that an accurate depiction of what should happen, in your view?

Mr. CHAMBERS. I think it is very important, Senator. I think that's the most important Indian initiative, in terms of the reorganization of the new administration right now. That's very key.

Senator MCCAIN. Well, I cannot speak for the chairman, obviously, because I haven't discussed it with him, but I think we would be more than willing to transmit a message to the incoming administration that we would seek not only a person who is an advocate for native American issues, but also a designation of one, as well.

Mr. CHAMBERS. I think that would be of tremendous value, Senator.

Senator MCCAIN. And I thank both witnesses for your important testimony.

Mr. Rowe.

Mr. ROWE. Thank you, Senator.

Is it fair to say, for the two participants in the second panel, that today you see more problems at the Department of Interior than you do at the Department of Justice?

Mr. CLAIBORNE. I think that is so. I wouldn't entirely excuse the Department of Justice. The fault seems to lie primarily with the Department of Interior in failing to send over the claims which it ought to be sending over—the suggestions, recommendations for litigation or for supporting litigation that ought to reach the Lands

Division of the Department of Justice, and if the case involves an appeal or Supreme Court matter, the solicitor general.

But it is open to the Department of Justice to act without this goad. There is a natural bureaucratic lethargic tendency to only react rather than to initiate, when the role traditionally has been that Interior's Indian advocate and Lands acts more as a screen sifting the meritorious from the unmeritorious cases.

Now that no cases, meritorious or otherwise, are being sent over, in my judgment the Lands Division has an independent duty to investigate and seek out such questions. And, indeed, they are reminded from time to time by tribal officials and tribal lawyers, and so cannot plead ignorance.

Mr. ROWE. Well, Mr. Claiborne, on your view of the Justice Department you were, in what many tribal representatives and counsel feel, if there was any office that did a better job, the office was the Office of the Solicitor General in the Department of Justice, and yet they had reservations about that office, and we have heard some of yours today.

But in this so-called last line of defense, you are particularly alarmed, are you not, by the decline in the number of filings of the amicus briefs—the friends of the court. Now, why is a friend of the court brief so vital from your standpoint?

Mr. CLAIBORNE. Well, it may be self-indulgent on my part to suppose that our briefs were critical in shaping the court's decisions——

Mr. CHAMBERS. They were. I can say that without any question.

Mr. CLAIBORNE. Because the Supreme Court's decision in any given case rules not merely the claimant—the particular Indian tribe—whose case comes before the court, but all others similarly situated, and because it may advance or retard the development of Indian law in a way that more accurately reflects the commitment of the United States to the tribes, each Supreme Court decision has this importance beyond its own facts and it is, therefore, critical that every weapon be used in order to attempt to persuade the court that it ought to make a decision which is favorable to the Indian cause rather than otherwise.

And so the method by which the Government more recently has contributed its part to that end has been the filing of amicus briefs. That is because Indian cases are now often litigated in the other courts by tribal counsel, themselves, unlike the common practice half a century ago.

I experienced that in preparing those briefs for the Supreme Court we were able to fashion newer arguments to take more winnable positions than the tribe was often in a position to do because of pressure from their clients. And because we spoke in the resonant voice of the United States of America the court was more inclined to listen.

Until very recently the court would press our participation by inviting the solicitor general to file a brief indicating the views of the United States in almost all Indian cases. The court ceased to issue the invitation when they realized that we would volunteer our views in any event. I'm hopeful that the court, now realizing that those views are not volunteered, will force the hand of the solicitor general by issuing an invitation, which has the effect of a command, but that has not happened yet.

Mr. Rowe. In a meeting that staff counsel had with the most recent solicitor general, Charles Freed, who has now returned back to Harvard Law School, in the last week of his tenure he sat down with staff counsel and said that his policy was that if the court invited a filing he would file, or if the Department of Justice recommended a filing he might file, but if those two did not occur he would not file a friend of the court brief, amicus brief. What concerns do you have about that most recent policy at the solicitor general's office?

Mr. Claiborne. I very much suspect that he did not tell you that he would file merely because the Department of Justice urged you to, but rather that he wouldn't file unless there were such a recommendation. Now, that is not a unique position. Other solicitors general have taken that stance, not necessarily in Indian cases but in other cases. I view it as wrong, and I was able, for the most part—at least in Indian cases—to persuade the solicitor general that the trust obligation of the Government to support and vindicate Indian rights did not fall solely on the shoulders of the Department of Interior—it fell on every official of the United States, including the solicitor general. Accordingly, he could not wash his hands of the problem simply by saying nobody has asked him.

But, in defense of Charles Freed, I must say that he was not alone in taking that easy way out. I'm happy to say that his predecessor was persuaded not to take that easy road.

Mr. Rowe. We have been informed that the most recent solicitor at the Department of Interior, Ralph Tarr, has, in coming over to the solicitor general's office—now, we did not get this from Mr. Freed, but rather from other sources—at one point stated that there was a trust obligation that the Federal Government had to the western States—apparently this was premised on a view that the western States had lost so much of the land to the Federal Government, and for the sizeable holdings that the Federal Government has in the western States. Apparently—and I say "apparently" because we did not get this from Mr. Freed nor from Mr. Tarr—there was a special obligation to these western States that, in fact, at least in one instance, should override the trust responsibility to the American Indian.

This is really a question for the two of you: have you heard that? And, if so, is it of concern to you?

Mr. Claiborne. Well, as counsel may remember, I did recite what is only hearsay from my point of view, not being at the solicitor general's office at the time, that this did, in fact, occur. My view of that is that it is entirely ill considered. It is not that the United States ought to have any special hostility towards the western States—far from it. But the western States ought to be treated, as Constitutional principle require, on an equal footing, not on a preferred footing.

The fact that there is much Federal land in the western States may, indeed, disadvantage them with respect to their tax base, but that is a problem that must be left to Congress to resolve and cannot justify a skewered representation by executive officials of the United States.

In all events, the special duty owed by the United States to Indian tribes is of a different sort. It is precisely not one of those interests that can be balanced away because there are more western States than there are Indian tribes or their population is more numerous. That would make a mockery of the notion that there is a special trust responsibility to the Indian tribes which derives from a very long history and very solemn documents starting with the Constitution, itself.

Mr. CHAMBERS. I have heard the same report by hearsay, and I have exactly the same concerns that Mr. Claiborne does.

It seems to me, Mr. Rowe, that this emphasizes exactly the need for institutional advocates for Indian rights within the Justice Department and the Interior Department who, if necessary, have the right to go around anyone who tries to throttle the presentation of the Indian rights before a court of the United States.

This particular controversy—at least as it was reported to me—came about with respect to the filing of a brief in a Supreme Court case that had already been written and was going to be filed supporting the Indian position, and the Solicitor should be the last person in the Government to be stopping that.

Mr. ROWE. Why should the Solicitor of Interior—explain your position on that.

Mr. CHAMBERS. Well, because the Solicitor of the Interior Department, probably more than any other official at that level of the Government, has a special obligation of trust to the American Indians and to their rights, and, in this case, to their governmental powers to enact taxes and to develop their resources. Indian development is obviously throttled if both States and tribes can tax companies doing business in Indian country. That discourages development on Indian lands.

But I think the important thing here is not the particular case, but the concept that the current occupant of that office has of the trust responsibility toward American Indians. This view is dramatically different from the prior occupants of that office, Democratic or Republican.

Judge Richardson in the Reagan administration, Mr. Krulitz in the Carter Administration, Solicitors Kent Frizzell and Greg Austin whom I served in the Nixon and Ford administrations—it is just diametrically opposed. In my view it is contrary to the legal responsibility that office owes to American Indians.

Mr. ROWE. Let me just repeat what Senators DeConcini and McCain stated earlier that they are communicating with the Departments of Interior and Justice for access to documentation on some of these cases for us to be able to examine whether this legal representation process is working. One reason we need to do this: at page 1 of Mr. Claiborne's statement he states that he has been involved in every category of cases involving public law except taxation and anti-trust law—such areas as criminal law, civil rights cases, claims against the United States, land cases, environmental cases, labor cases, cases involving all deregulatory agencies.

And yet at page 10 of his statement—and I want to read this into the record,

> In my last years as Deputy Solicitor General I, therefore, found myself expending disproportionate energy persuading the Solicitor General to ignore the silence of

others, soliciting advice "under the table" from the suppressed Indian advocates at Interior and Justice, preparing Supreme Court amicus briefs on my own and finding all manner of sniping before they were eventually filed."

This is not how the system is supposed to work. We will be following up on getting that access.

I just have one or two more questions for you, Mr. Chambers, before I turn it over to the associate counsel.

Why were you selected? What conditions were there in your selection process as the assistant solicitor for Indian affairs back in the mid-1970s?

Mr. CHAMBERS. Well, I was selected at the start of the second Nixon administration, Mr. Rowe, and I was surprised to be interviewed, frankly. I was a professor at that time teaching Indian law and a full bevy of other courses at UCLA Law School. I was involved with two public interest law firms, the Native American Rights Fund and California Indian Legal Services. I served as counsel to them and was bringing cases on their behalf in addition to my teaching duties. And I was also an active Democrat, so I hadn't expected to be interviewed for the job.

I think that it was due to the fact—I agreed with what Mr. Garment said earlier today—that the Solicitor of the Interior Department at that time was Kent Frizzel—a uniquely able man, I think. Kent had been out at Wounded Knee and had actually negotiated the Wounded Knee settlement, and I think Kent was profoundly affected by what he saw in the middle of that winter on that South Dakota Indian Reservation—the poverty, the distress, the alienation—and he wanted to do something about it. So he reached out to what was the Indian bar at the time, which was much smaller than it is now—the law professors, the public interest law firms that were involved. There were very few Native American lawyers. His first priority was to hire a Native American for that job, but he ultimately couldn't find one that suited him so he did interview me.

I can only surmise, but I think it was actually my record, and that of the groups I was associated with, as an advocate for Indian interests that attracted Kent to me, and I think that record probably was attractive to the White House staff and others within the administration, as well.

Mr. ROWE. And did he discuss with you how you would carry out that job, and if there were disagreements, how those would be resolved?

Mr. CHAMBERS. Yes; when I interviewed him, in his office, he said, "What would you do if you had this job?" As I say, I thought, well, I'll tell him what I would do, although I thought at that point it was unlikely he or anyone in the Solicitor's job would want to do what I wanted to do. I said, "I want to be solely the advocate for Indian interests. This department is a power broker—it has other interests in it. I would not have any responsibility for serving those interests. I would bring to you conflicts between Indian rights and those other bureaus. You or the Secretary would resolve them. I would want the Government to be much more involved in the bringing of cases for Indians, and for asserting Indian rights against States and against private persons." That burden, at that time, was being shouldered mainly by the legal services organizations of the country like California Indian Legal Services and the Native American Rights Fund. I thought this should be mainly the obligation of the Government. That was what the trust responsibility was about, as I saw it.

I said "that's what I'd want to do, and I can understand if you don't want to do that." He said, "What would you do if I told you you couldn't bring a case?" I said, "Well, if you told me I couldn't bring one case I would accept that. If you didn't want to bring the kinds of cases I want to bring, there wouldn't be any point in my leaving California and coming back here, so I would expect that if you hired me, that you want to bring these kind of cases. But if you bring 60 percent of the cases I want to bring, it will revolutionize the representation of Indian rights within the Government."

Kent brought far more than the sixty percent, and his successors and my successors continued that policy. It wasn't just something with one person or two people. It wasn't just Frizzell and Chambers, it was a whole period of Solicitors and a whole period of Associate Solicitors.

Naturally, I think it is a shame to have seen it come to an end. It has come to an end, though.

Mr. ROWE. Let me ask you that question. Without getting into policy questions about what needs to be done, what is your concern today about the people who have been serving in at least the linchpin position of the position that you held, the position of Associate Solicitor for Indian Affairs? You held that job. You had the experience, and you certainly had the commitment. But I gather, based on your testimony today, you don't see an individual in at least that job who has got either. Is that fair?

Mr. CHAMBERS. Well, Tim Vollmann had it. Tim Vollmann was the Associate Solicitor who was my successor during much of the Reagan administration.

Mr. ROWE. He's no longer there, though.

Mr. CHAMBERS. Until the summer of 1987. I have not noticed it within the Department since he left. When I go down there now to meet with the lawyers in the Interior Department I feel like I'm talking to judges, not to advocates. In other words, when I go down as a tribal attorney and want a position taken for the tribe, I think the standard should be the one that Louis Claiborne articulated: that if there is a reasonable basis for the Indian position, the lawyers within the Interior Department who are charged with that responsibility as trustee ought to advocate it. Now, if there is not a reasonable basis for the tribal position then they shouldn't.

I think, with all respect, that the positions I have been asking them to advocate when I have been down there have been reasonable. I've made that judgment on behalf of my clients. I can't advocate a position for one of my clients that has no reason or basis in the law. I'd be violating my duty to the courts.

I find, when I go down there now, that I have to persuade them that the position is objectively right, that it's in keeping with whatever their view of public policy is. And I think that is the wrong standard for the trustee within the Department to use to judge an Indian position. So I do feel that the current Solicitor and with respect to the current Associate Solicitor are not carrying out their duties. I do feel that.

Mr. ROWE. And would one bit of advice for the incoming secretary be that in that linchpin position that you at least get somebody who has got the experience—and hopefully the commitment—in Indian matters to fill that position?

Mr. CHAMBERS. Both the expertise and the advocacy position with commitment. You know, one of my immediate predecessors—the first Associate Solicitor during the Nixon administration, actually—I don't know if Brad and Leonard are still here or if they remember—was a very nice man, but he had no background in Indian affairs. It wasn't just that advocacy suffered; it was that he didn't have the experience to get the work out. He didn't know anything about Indian law. For example, after he had been there for some weeks he called one of his staff members in and asked him what an allotment was. Now, this I have by hearsay, but I think it's reliable. That tends to retard the efficiency of the representation of Indian rights within the Department.

I think it would be as silly, Mr. Rowe, as for me or Mr. Claiborne to be the chief counsel for the Internal Revenue Service. Mr. Claiborne and I haven't practiced tax law.

Mr. ROWE. It might be better for us as taxpayers.

Mr. CHAMBERS. I don't think so. I think it would be inefficient. You need someone who knows what they're doing.

Mr. ROWE. Yes, sir.

Let me turn over the rest of the questions to associate counsels George Brent Mickum and Carl Mayer.

Mr. MICKUM. Thank you.

Gentlemen, why has there been such a marked decline in the filing of affirmative litigation on behalf of the Indian? And to whom do you attribute responsibility for the decline?

Mr. CLAIBORNE. I think it is primarily to be charged to the Interior Department and their failure to send over suggestions for such litigation. But, as I have indicated, that is only a partial answer because sometimes it is a matter of defending Indian tribes who have been sued, and in such cases at least the Justice Department has an equal responsibility.

Their normal practice would be to send that matter over to the Interior Department for, as it were, an expert advice and recommendation. And if nothing returns, it will, again, be a default at Interior, but it is not a sufficient excuse for Justice not to take action.

I think both Departments are at fault. I'm less aware than Mr. Chambers probably is as to how the numbers have fallen in the lower courts. I am aware of the difference in the filings in the Supreme Court, and I find that troublesome, even though we're speaking of a far smaller number of cases, but, by definition, ones that will rule in many comparable other cases, and therefore of equal importance.

But I think Mr. Chambers is probably in a better position to respond to your question.

Mr. CHAMBERS. No; I agree with that. I think both agencies bear some burden of explanation on it.

I do feel that there are, Mr. Mickum, a lot of cases now being handled by the Justice Department that were sent over by the Interior Department before this policy change or this change in attitude or however one wants to describe it.

I feel that those cases of those that I know about—I mean the ones that I am involved in—are being handled capably by the Lands Division as advocates. Those are mainly the water cases—some in your State, Senator. We're representing the Hopi Tribe in the *Little Colorado River* Case, and that's basically being handled capably by the Justice Department.

But I think that there aren't new cases being generated. I would agree with Mr. Claiborne. He took a lot of initiative within the Justice Department and made things happen, and I think I did the same thing within the Interior Department, so we each see it probably from the perspective of our own positions in our own Department.

I think there is certainly room in either Department for an activist, assertive position, and I think that role is dictated by the ideals to which this Nation is committed, as well as the law.

Mr. **Mickum**. Mr. Claiborne, do you sense there is a certain inertia or reluctance on the part of the solicitor's office and the Department of Justice to test the limits of Indian case law? To really push them? I seem to hear Mr. Chambers saying that he has experienced that reluctance.

Mr. **Claiborne**. Well, I think that's an important point. In situations where the law is well settled—usually by a Supreme Court decision—there will be scant excuse for either department to fail to take the Indian position except on a pretext that their voice is not needed because the law is already declared, and that is a pretext sometimes invoked.

But what is more important is the failure—and I think it has become more prevalent because already there was resistance while I was still in the solicitor general's office—to taking more innovative positions, and, as you put it, pushing the law of vindicating Indian rights beyond the settled limits. That creative role is, as I sense it, no longer prevailing in either Interior or Justice, and is rather a matter of sitting back.

Now, there is a sense that Indians have prevailed too much and that they've won surprising victories. There were those who did not expect them to win from the Supreme Court recognition of their right as sovereign or quasi-sovereign political bodies to tax non-Indian activity within their territory, and there were those who were surprised at the extent to which the Supreme Court found that not only they, but those who dealt with them on the reservation, were exempted from State taxation. Those decisions had very substantial impact on oil companies, on States, and the reaction was rather strong.

So the resistance is not all self-imposed. There is a strong wind blowing both at Interior and at Justice these days that enough is enough, don't press it any further.

I suspect that the momentum of moving forward has been totally arrested, and only with a strong and visible Indian advocate in each department who is insulated and who insists on pressing forward will there be any movement.

Mr. **Mickum**. Mr. Chambers, I hadn't meant to put any words in your mouth, but do you pretty much concur with Mr. Claiborne?

Mr. CHAMBERS. I agree exactly with Mr. Claiborne. I think that this is a law reform area, and enough will not be enough, Mr. Mickum, until all of the treaty rights are protected—until the Indians have assumed a full measure of tribal sovereignty which the law affords to them.

It is absurd to think that enough is enough. There is much left to do. There is much left to do just on an economic and social basis, too. The lack of business development and the lack of economic development on Indian reservations attests to the fact that much more needs to be done legally and economically. And I think it has just begun.

It is a law reform area. In that kind of area, you don't bring shaky cases. You expect to win every case. But if you win all your cases, you're not being aggressive enough. Some of them you're going to lose, and we lost some of them. We lost the criminal jurisdiction over non-Indian issue, and we lost others. We lost some of the reservation boundary cases. We lost some of the water cases. But you never know exactly where the line is in terms of where the law is going to come down, so you've got to be out there on the frontier. I think Mr. Claiborne is absolutely right in his assessment of it.

Mr. MICKUM. Let me ask you this: do you feel that it is possible for an Indian tribe that is being represented solely by the Federal Government to be assured that it's going to receive adequate and effective legal representation?

Mr. CHAMBERS. Well, I think there are two things to say about it, Mr. Mickum.

There is no question today that the lawyers within the Justice section and the Lands Division that litigate Indian issues are adequate and effective in every sense of the word. They are very capable, professional lawyers.

I do think that sometimes something will come up in a case where they are hamstrung in one way or another. Let me give an example. Mr. Claiborne already gave the example of Senator Laxalt's approach to the Attorney General. Our firm was handling a case several years ago—about a decade ago, actually—where we were representing the Puyallup tribe in the State of Washington: The Secretary of the Interior had been, pursuant to regulation, taking land in trust for the Puyallup Indians around the city of Tacoma, and the city of Tacoma brought a suit to stop him from taking the land in trust. The defendant was the secretary of the Interior.

The question came up as to whether we should intervene in the suit as attorneys for the Puyallup Tribe. We did intervene and we worked hand in hand with the Justice Department. But there came a time when the Justice Department essentially consented not to take any more land in trust for the Indians in the case, reversing the position that they had been taking before the court.

We inquired about it. We found out what had happened was that Senator Henry Jackson from the State of Washington—at least by hearsay—had made a telephone call to the Solicitor and the Secretary of the Interior Department and said, in effect, this is my State and I don't want this land taken in trust any more. And Interior passed the word to the Justice Department, and it stopped.

Now, that doesn't have to do with adequate or capable lawyering—that just has to do with litigating a case in a political atmosphere. These cases are often highly-charged political cases.

I'm not suggesting that it is improper in a democratic government for someone to make their views felt to the elected political officials, or for elected officials to contact the Secretary. That's not the point. The point is: in the handling of litigation you can never be sure but that the position will be watered down, that an instruction will come to Justice from the client agency—and, in my experience, the contacts from political forces are much more strongly made and more strongly felt at the Interior Department where I served than in the Justice Department where Mr. Claiborne served. That can happen.

So we always advise clients that when they are affected by a lawsuit where the United States is representing their interest that the tribe needs to intervene and be involved in making sure that its rights get advocated, as we feel they should. I think that is inevitable in this kind of structure.

Mr. MICKUM. Mr. Claiborne, in your statement you allude to the decision rendered in *Nevada* v. *United States.* Why do you believe the court has placed the burden on Congress to resolve the institutional conflict of interest?

Mr. CLAIBORNE. Well, remind the hearing that that case involved an effort to re-litigate what the Government had filed to put forward, that was the claim for fishery water out of the Truckee River for the benefit of the Pyramid Lake Tribe.

To its credit, the United States, very late in the day, sought to re-open that decree rendered back in the 1940s so as to now obtain with an early priority date some water for that Indian fishery. That effort had failed in the lower courts, and we took it to the Supreme Court of the United States.

The argument was made by the tribe that the United States ought not be bound by the judgment that had been rendered in its favor, but which failed to allot any water to the tribe for fishery, because its representation was marred or compromised by a conflict of interest and, indeed, there had been a conflict in that it had been determined to represent the white farmers of the Newlands Project in preference to the Indians in respect to their fishery water.

But the court did not accept this argument and rebuffed it with a statement that it was not they but the Congress of the United States that had forced upon Government lawyers the obligation to represent competing Federal interests. The reclamation project interest was a perfectly legitimate Federal interest; so was the Indian fishery water claim a legitimate Federal interest.

The court did not go so far as to say that it was right to subvert the tribal interest by preferring the white farmers, but it did say that the so-called conflict of interest was not a reason for treating their representation of the tribe as inadequate or defective or subject to re-examination, and in doing so very pointedly said, as I have indicated, that Congress has placed these competing responsibilities in the Department of the Interior and has charged the attorney general with representing all Federal interests, conflicting or otherwise.

Accordingly, I think it does fall to the Congress to consider whether to take up this invitation from the court to divide to some extent the responsibilities within each of those departments.

I would urge the committee to consider the proposals that we have made here, which is perhaps a half-way house—but, as Reid Chambers says, I think it may be the best of both worlds—that is a partial segregation of Indian representation within each department with high-level presidential appointees requiring confirmation by the Senate in both of those departments so as to alleviate, to some degree, the problem which, as the court put it, the Congress had, itself, created by placing these conflicting responsibilities in each of the departments.

Mr. **Mickum**. Thank you, gentlemen. I'm going to turn it over to Mr. Mayer.

Mr. **Mayer**. Thank you.

Mr. Claiborne, would you comment on what you perceive to be the importance and significance of the Washington Fishery Case?

Mr. **Claiborne**. Well, there are several aspects of that case, which was of enormous complexity and dimension, that involved the right of a number of Indian tribes, as a result of a number of treaties which had been negotiated by Commissioner Stevens with the various tribes of the Pacific Northwest around Puget Sound and the tributary rivers that flow into it with respect to preserving their right to fish in those waters in return for the cession of their lands.

The United States had some years earlier begun litigation to vindicate, at long last, these guaranteed treaty rights which had been ignored for now almost a century—perhaps more than a century.

That kind of litigation was extremely burdensome, complex, and was going to provoke controversy. The tribes involved were, on the whole, while numerous, small tribes who were not in a position to shoulder that burden individually. And so it was an instance in which the representation of the tribes by the United States was particularly appropriate and essential.

What is more, when the case came for decision before Judge Boldt, it must have weighed with him that the United States, itself, was construing its own treaties in this fashion, that the United States was vigorously vindicating Indian claims which it knew would disturb the fishing industry in that part of the world in a very substantial way, and ultimately would stand behind the court's decree when all hell broke lose, as it did.

And, as I have indicated earlier, the resistance to the implementation of that decree by the State attorney general, by State officials at every level, by the State courts—including the Supreme Court of Washington—was such that the interposition of the United States was peculiarly important.

And so I use it as an illustration of an extreme case, but not an absolutely unique case, in which participation in litigation on behalf of tribes by the United States is not only useful, but indispensible. I think that was such a case.

We pursued it to the Supreme Court of the United States and ultimately prevailed with a judgment which is of considerable importance to those Indian tribes.

Mr. **Mayer**. Thank you.

Mr. Chambers, do you think that there is an open door policy at the Department of Interior today? Specifically, do you find it worthwhile to work with the Solicitor's office in matters that you are handling today on behalf of American Indians?

Mr. **Chambers**. I don't think the door is closed to the extent that people don't return your phone calls or that you can't get a meeting with them, Mr. Mayer. But the problem really is that you can't get a sympathetic response.

In my prepared statement I detailed the two cases that I asked them to support my clients—and I hadn't asked them before that because I just suspected that, given the current administration and management of that department, that they wouldn't do it. And, indeed, they didn't. And, again, I emphasize these weren't far out or far fetched cases, in any sense. We successfully settled one and we have won the other one in the district court level.

So I think that the problem is that it is not a question of not being able to meet with the people or talk with the people; it is that the view that they seem to have is different than all of their predecessors for the last 20 years, and different, I suggest, than the legal mandates and the moral and ethical mandates and the ideals of this country when it is dealing with American Indians, which is that the officials that are dealing with American Indians for the Federal Government are constrained to act with the highest duties of responsibility and trust—the ones set forth in the Chairman's statement here this afternoon. They're not doing that. They don't view themselves as obliged in that way. And I think that is contrary to the bipartisan consensus for two decades, and it is something that should change.

Mr. **Mayer**. Have you heard anything about this chilling effect from others who practice in your field?

Mr. **Chambers**. Well, there is a general feeling among attorneys representing Indian tribes that there is no point in asking, and that you try to stay away from there. There are much more fertile fields in the Washington political firmament for protection of Indian rights, particularly—and I would say this even if I weren't testifying here or on the record—particularly this committee. This committee has been a bright light in the past several years at a time when the lights have been dim down on the other end of Pennsylvania Avenue.

But there are others. The Environmental Protection Agency is one that has been generally supportive of Indian rights. It is not just a question of everything in the administration. But there are places to go—or to the courts. You ultimately find that you're just better off going to court rather than trying to convince them on these kinds of issues.

Mr. **Mayer**. Thank you.

No further questions.

Senator **DeConcini**. Thank you very much.

Gentlemen, thank you for your testimony today. It has been very helpful. I do wish that we had had the access of the case files that we had asked the Department of Interior and Justice Department to provide for us—particularly those closed cases. I think, as the record shows here, nothing devious nor any conflict would have been brought about by being able to go into some of those matters with you here, and as Senator McCain indicated we're going to continue to try to bring that about because I think we can lay a record here of the need to change the present situation.

I want to thank you for taking the time and being with us this afternoon and for the thoughtful, very thorough testimony you have given.

We will return to this issue—the issue of legal representation—at the end of our first phase of hearings in about the middle of February.

[Other materials submitted for the record appear in appendix.]

Senator DECONCINI. Tomorrow the committee will begin our examination of Indian contracting. We will be hearing from legitimate Indian contractors in the morning and proceed in the afternoon to hear evidence of fronting arrangements.

The committee will stand in recess until 10 a.m. tomorrow morning.

[Whereupon, at 5:05 p.m. the subcommittee was adjourned, scheduled to reconvene at 10 a.m. on Tuesday, January 31, 1989.]

FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

TUESDAY, JANUARY 31, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC.

The special committee met, pursuant to recess, at 10:05 a.m., in room 216, Hart Senate Office Building, Hon. Dennis DeConcini (chairman of the special committee) presiding.

Present: Senators DeConcini, McCain, and Daschle.

Staff present: Kenneth Ballen, John Brandolino, J. Sedwick Sollers III, and Alan Parker.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator DECONCINI. The Special Committee on Investigations will come to order. This is the investigative phase of our process; Congress has a long history of investigations, and we are proud to continue in that tradition.

The format, of course, will be different than yesterday's. All witnesses will be sworn, and there will be no statements from the witnesses, and counsel will begin the questioning, after which Senators will question if they so wish.

Since I'm cochairing the committee with my colleague from Arizona, Senator McCain, we will alternate between witnesses in the questioning.

We'll begin this morning with Mr. Jefferson Begay, who will be questioned by chief counsel, Mr. Ken Ballen.

[Witness sworn.]

Senator DECONCINI. Would you state your name and residence for the record, please?

STATEMENT OF MR. JEFFERSON BEGAY, PRESIDENT, AMERIND CONSTRUCTION, INC.

Mr. BEGAY. My name is Jefferson Begay, and I live in Tempe, AZ.

Senator DECONCINI. We welcome you here from sunny Arizona. It was 74 degrees yesterday, I understand?

Mr. BEGAY. Thank you, Senator.

Senator DECONCINI. Mr. Ballen.

Mr. BALLEN. Thank you, Mr. Chairman, Mr. Cochairman.

Mr. Begay, what is your current position?

Mr. BEGAY. I am president of Amerind Construction.

Mr. BALLEN. What kind of firm is Amerind Construction?

Mr. BEGAY. Amerind is a small general contracting firm. We build houses, Federal houses, highways, and commercial development.

Mr. BALLEN. Where is the firm located, sir?

Mr. BEGAY. Our offices are located in Tempe, AZ.

Mr. BALLEN. Are you a member of a Federally-recognized Indian tribe?

Mr. BEGAY. I'm a member of the Navajo Tribe.

Mr. BALLEN. Sir, what is your educational background?

Mr. BEGAY. I have a degree in construction from Arizona State University's College of Engineering and Applied Sciences.

Mr. BALLEN. Could you describe briefly for the members of the committee your background in the construction industry itself?

Mr. BEGAY. After graduation from college, I worked in the Phoenix Valley with various general contractors, the larger general contractors—Kitchell, MM Sundt, Chanen Construction Company.

I worked as a project engineer, field engineer, project estimator, and project manager.

Mr. BALLEN. Now, sir, when did you form Amerind Construction?

Mr. BEGAY. I formed Amerind Construction July 5, 1985.

Mr. BALLEN. How was Amerind formed?

Mr. BEGAY. Amerind was formed——

Mr. BALLEN. Are you the sole stockholder?

Mr. BEGAY. I own 100 percent of the stock.

Mr. BALLEN. OK. How was it formed, sir?

Mr. BEGAY. It was formed through the assistance of a savings and loan company. I assisted a savings and loan company that was in trouble with an Indian front operation that had dipped into the bag, so to speak. They were in trouble, and they asked me to come in to take over the company after the bank had repossessed the company.

As a favor, I asked them for financing.

Mr. BALLEN. And as a result of that relationship with the bank, you were able to establish your own firm?

Mr. BEGAY. Yes, sir.

Mr. BALLEN. Bidding and obtaining Indian preference work?

Mr. BEGAY. A good percentage of our work is Indian set-aside.

Mr. BALLEN. From what agencies and tribes have you obtained Indian preference work?

Mr. BEGAY. I have worked with the Office of Indian Programs, HUD, building houses—I have contracts with the Bureau of Indian Affairs, Phoenix Area Office.

I have worked with the Papago Indian Tribe, the Yavapai-Apaches out of Camp Verde, the Navajo Tribe, and the Quechan Indians in Yuma.

Mr. BALLEN. Could you briefly explain how your company is given Indian preference when you bid on Indian set-aside work?

Mr. BEGAY. In order to bid on Indian set-aside work, your company must be qualified through a certification process that both the Office of Indian Programs, HUD and also the BIA has. It's basically filling out the requisite forms and submitting them for approval.

Mr. **Ballen**. So it's simply the forms that you have to submit that qualify you?

Mr. **Begay**. That's correct.

Mr. **Ballen**. Is a qualification standard 51 percent ownership by an Indian?

Mr. **Begay**. I believe that's the minimum.

Mr. **Ballen**. Now, sir, in your experience as a contractor, how has the construction industry reacted to the availability of Indian preference work?

Mr. **Begay**. The construction industry in general, I believe, reacted by taking advantage of the buy-Indian program. A good percentage of my competitors are front companies.

Mr. **Ballen**. When you say "a good percentage of your competitors" are front, to your knowledge, how many of your competitors are legitimate Indian contractors like yourself?

Mr. **Begay**. To my knowledge, I would say that possibly two in Arizona are legitimate Indian companies, out of the five to seven companies that are presently there now.

Mr. **Ballen**. Now, sir, when you describe a front, what do you mean by a front?

Mr. **Begay**. A front operation is where a large corporation that has the finances and the bonding capability would come in, maybe out of their own labor ranks, pick out an Indian employee, and give him a pickup truck, a weekly salary, and make him Mr. President, which would qualify them to bid on Indian set-aside jobs.

Mr. **Ballen**. To your knowledge, have you had experience with certain firms bidding on Indian set-aside work, where it became apparent to you that they were fronts?

Mr. **Begay**. Apparent through observation—I myself have been involved in construction for a number of years before I got into the construction industry, and you know people who are in the industry. It's obvious from visual inspection what's going on, and of course there's a lot of street gossip—laborers, foremen, superintendents that have worked for other companies will come to me, or people who are working for our company—a lot of this information is usually reliable.

They would say that so-and-so is not the real operator behind this company, and that the real company is such-and-such a company.

Mr. **Ballen**. In fact, sir, did you give to members of the staff of this committee over 10 different companies that you believed from your observations were in fact fronts?

Mr. **Begay**. Yes, sir; I did.

A lot of them, I understand, will be brought out in the hearings this afternoon.

Mr. **Ballen**. Now, Mr. Begay, how is the front set up, in terms of administrative fees and other structure to the front?

Mr. **Begay**. I was approached by two companies.

Prior to Amerind Construction, I was approached by a company in Phoenix. I was offered $24,000 as a loan, that I would put into the company. The joint venture would be started with my $24,000 loan, and the contribution from the other company.

We would bid the Indian set-aside projects. The project that was awarded would be charged administrative charges for payroll, bonding, financing, supervision—what is usually called general conditions in the construction industry—the indirect charges to the job would be deducted from the job cost, and then of course you have your direct charges, which would be your actual construction costs, your concrete, steel, labor, whatever it is.

What was left of that would be net profit. I would receive one percent of net profits, with which I would repay my loan back on. In a situation like that, it would be a long while before I paid my loan back.

I didn't accept that offer, and I was approached by another company to do the same thing.

Mr. **Ballen**. So essentially, you would be the nominal owner, but not realize any of the profits, and be on a salary.

Mr. **Begay**. That's correct. I didn't want to be anyone's token Indian.

Mr. **Ballen**. Has the existence of these fronts, Mr. Begay, hurt your business?

Mr. **Begay**. Yes; it has.

Mr. **Ballen**. How so?

Mr. **Begay**. It creates competition for me. I have to compete with companies that have more bonding capacity, that can take greater risks than my small company can. For instance, when I bid a job, I make sure that it isn't such a tight squeeze that I do not have a great risk on that particular job.

A large company will take greater risks, because they can spread the risk over several jobs, and maybe on the fourth or fifth job, they can make their bid for a larger profit margin.

I can't do that. I have to be careful on every job that I bid.

Mr. **Ballen**. And wouldn't the larger firms have economies of scale, and cash flow, and access to materials that you wouldn't be able to get?

Mr. **Begay**. That's correct, sir. That's what I'm referring to. They have more money in the bank, and they can afford to take the risks.

Mr. **Ballen**. And, sir, has the existence of these fronts to your knowledge resulted in shoddy construction work being performed on the reservations?

Mr. **Begay**. I know of subcontractors who would come to me, after they've been awarded certain jobs under these companies.

When we bid a job, we usually bid it under a reasonable pricing for labor, materials, and a reasonable profit margin. Companies that come in, that lowball a job, will usually establish what's termed in the industry as "pulling numbers out of the air" for any portion of the subcontract.

For instance, concrete—they may have performed a job 3 years ago, and they will use the same cost parameters to establish a concrete number. That concrete number is taken to bid date, which would be—it isn't a relevant number anymore, because prices aren't—they don't exist like that anymore.

So the general contractor will peddle that number to a subcontractor, and say, "You can have the contract on concrete work if you will accept this budget and do the work for this amount."

And then what happens is that the subcontractors will take shortcuts in order to meet that budget, which is skinny to begin with. So it affects the quality of construction and what's delivered to the owners.

Mr. **Ballen**. And to your knowledge, you know of at least one front firm that has engaged in this practice, and subcontractors have come to you to complain about it?

Mr. **Begay**. That's correct.

Either their funds were held back—I've had a number of complaints that they were not going to bid that particular company anymore, because their subcontracting payments were not made over a period of time. And we're talking about Indian subcontractors. I think that the intent of this legislation, the Buy Indian Act, was to try to promote Indian businessmen.

You have Indian subcontractors out there that are awarded these skinny subcontract budgets, and then what happens is that they go belly up, and they don't exist anymore.

I've had a number of them coming to me, complaining about these general contractors that have been awarding in this manner.

Mr. **Ballen**. So the existence of front general contractors is not helping the Indian subcontractors, either.

Mr. **Begay**. No, sir.

Mr. **Ballen**. Have the Federal agencies done anything to get rid of this proliferation of fronts?

You have experience with BIA and HUD and the other agencies.

Mr. **Begay**. I don't think anything formally has been done to get rid of these. I know that they will question certain ones, and they are aware of them.

Mr. **Ballen**. Why do you say that?

Mr. **Begay**. Because I've been to both the Bureau office and I've been to the HUD office, and officials there acknowledge the fact that there are front organizations. But the basic comment is that "we can't do anything about it, our hands are tied." And that's unofficial.

Mr. **Ballen**. Now, sir, you've been in the business for over 3½ years. Has anyone from BIA or HUD or any other Federal agencies come to your offices to look at your books, to see whether you were in fact a legitimate Indian contractor?

Mr. **Begay**. I turned in the required forms to qualify, to be a Buy Indian contractor. I have never had the Bureau of Indian Affairs nor the HUD officials come to my office, although I've invited them to come to my office.

Mr. **Ballen**. Have you ever heard of them going to any other offices in terms of their work, to see whether the companies are legitimate?

Mr. **Begay**. I'm not sure. I don't know.

Mr. **Ballen**. You've never heard of it?

Mr. **Begay**. No; I haven't heard of it.

Mr. **Ballen**. None of your competitors, or none of the people in the field have said that I was visited today by BIA or HUD?

Mr. **Begay**. I've never heard of any.

Mr. **Ballen**. Sir, when you tried to start your own business, and indeed started it, what problems did you face? Did you go to SBA, for instance, to try to get help with bonding?

Mr. **Begay**. Well, bonding, I think, is the key issue in the Indian front.

The Indian fronts exist because Indians cannot get bonding. I was fortunate enough to get letters of credit from this bank I was making reference to, and I bid my work under a letter of credit situation, bonding situation.

I approached the Small Business Administration Guaranteed Bond Program early on, and I was told that my company did not have enough experience, and that I did not have enough money in the bank to qualify for a bond, a Guaranteed Bond, and to come back within 2 years, after I had some projects under my belt.

I did that—I waited 3 years instead, and when I went back 3 years later, they told me that I was too successful for the program.

Mr. BALLEN. You didn't have enough, and then you were too successful?

Mr. BEGAY. That's right.

Mr. BALLEN. Sir, when you first started your business, did you consider placing it on your home reservation, the Navajo Nation?

Mr. BEGAY. I think that every Indian has a heartbeat for their homelands, and of course I wanted to locate my business on the Navajo Reservation, so I could help the employment out there, and become active in the building construction that the tribe puts out for bid occasionally.

I did not, for several reasons, political and business.

Mr. BALLEN. What were the reasons that you didn't locate on the Navajo reservation?

Mr. BEGAY. Politically, I worked for the former tribal chairman of the Navajo Tribe, and I had——

Mr. BALLEN. Who was that?

Mr. BEGAY. That's Chairman Zah, Peterson Zah.

I worked with him under the Hopi-Navajo programs, I had a Z branded on my forehead, and I couldn't go up to the Navajo Reservation. It just operates that way.

Mr. BALLEN. Are there any other reasons you decided not to locate on the reservation?

Mr. BEGAY. There are—it's just the business environment. If a fellow wants to do legitimate business, it isn't a good environment for that.

Mr. BALLEN. Why not?

Mr. BEGAY. There's always people on the take. There are tribal councilmen, or the administration—there are always people on the take.

I don't want to do—I don't want to get hooked on something like that, because once you start giving money, there's no end to that.

The other reasons why I located in Tempe, AZ is that I want to establish Amerind Construction as a legitimate business enterprise.

I have to deal with bonding companies, insurance companies, I have to deal with banks which I get loans from.

Bonding companies and banks like to have street addresses, and they like to see real property when they walk into your office that they can take over, in case you don't finish a job, and an address that is something like Tsesto Trading Post, Star Route, Winslow, AZ just won't do.

Mr. BALLEN. Is it difficult to retain that kind of bonding if you're on the reservation?

Mr. BEGAY. That's correct.

Mr. Ballen. Mr. Chairman, I have no further questions.

Senator DeConcini. Mr. Begay, you said there, and I just want to follow up—was it HUD that told you you were too successful?

Mr. Begay. Senator, that was the Small Business Administration.

Senator DeConcini. SBA told you that?

And——

Mr. Begay. Guaranteed Bond Program.

Senator DeConcini. Explain that program to us, would you please, for the record?

Mr. Begay. The program—well, take a small business enterprise such as myself, that is, averaging less than $3.5 million per year, will acquire corporate bonding which is Treasury listed. The SBA program guarantees 90 percent of that bond. It's a good program.

Senator DeConcini. And then after you achieved so many dollars' worth, or is it a period of time—then you graduate, so to speak, from the program?

Mr. Begay. That's the intent of that program.

Senator DeConcini. Then once you're out of it, you're supposed to be able to get bonding in the marketplace?

Mr. Begay. Once you graduate from that bonding program, then you have enough money in the bank, and enough experience behind you to go to any corporate bonding agency and acquire your own bond.

Senator DeConcini. How much experience and how many contracts had you had when they told you you wouldn't qualify for the program anymore?

Mr. Begay. Well, as a business enterprise, we had approximately a year to a year and a half under our belt when I went to them the first time.

Senator DeConcini. Then how long were you in business until they told you that they wouldn't do it.

Mr. Begay. I stayed and operated up until, oh, I'd say 3 or 4 months ago.

Senator DeConcini. You were in business until 3 or 4 months—so what period of time was that?

Mr. Begay. Approximately 3 years, 3 months.

Senator DeConcini. Approximately 3 years.

And in the course of that, what is the volume of construction work you've done? Can you give us a ballpark figure?

Mr. Begay. I have averaged approximately $3.6 million per year.

Senator DeConcini. $3.6 million per year?

Mr. Begay. Million per year, yes.

Senator DeConcini. So you've done close to $10 million during that period of time?

Mr. Begay. Yes, sir.

Senator DeConcini. Now, that being the case, you found it difficult to get bonding after the SBA program was not available to you?

Mr. Begay. Bonding is one of the most difficult things to get for an Indian contractor.

Senator DeConcini. Why is that, in your opinion?

Mr. BEGAY. In my opinion—I believe that our predecessors, not only Indian, but other minority business enterprises, have left a bad impression on the business.

There have been a lot of minorities and Indians that were bonded, and a lot of them just never—they failed to complete their contracts.

Bonding companies are reluctant to bond minority and Indian business enterprises.

Senator DECONCINI. And is that, in your opinion, one of the attractions or reasons that fronts have been created?

Mr. BEGAY. I would say that is the sole reason why the front situation is created.

Senator DECONCINI. You say——

Mr. BEGAY. Financing.

Senator DECONCINI. I mean from the standpoint of an Indian contractor, getting a front, or participating in a front?

Mr. BEGAY. That's correct.

Senator DECONCINI. In your judgement, what can the Government do to solve that problem?

Mr. BEGAY. I would say that the Government could establish a guaranteed bond program for Indian contractors.

Senator DECONCINI. Yes.

And in other words, don't have it terminate as the SBA program did? Have it continue?

Mr. BEGAY. Well, I think there should be incentive to graduate. I believe that there is detriment to paternalism.

I believe that—I myself would like to have graduated into a situation where I can afford my own bonding, and operate on the level with everyone else in the Valley of Phoenix and the State of Arizona.

Senator DECONCINI. Sure.

Do you think the Indian preference program is a desirable program? Is it worthwhile?

Mr. BEGAY. Yes, sir, I do.

Senator DECONCINI. And is there—you say that only two out of the five or seven companies doing work on the reservation now—you believe to be genuine Indian contractors? That means that they are solely owned and solely operated by native Americans, is that what you mean by that?

Mr. BEGAY. Yes, sir.

Senator DECONCINI. Where the others may have someone in the appearance of ownership, but in fact someone else controls and finances it, is that what you mean?

Mr. BEGAY. Well, Indian-owned is easily done on paper. Controlled and operated is another story.

Senator DECONCINI. Yes.

When you have contracts there, who if anyone checks whether you are truly an Indian-owned enterprise, or is the fact that you know people up there and they know you—is that how they know that's the case?

Is there any procedure to go through where they check on that?

Mr. BEGAY. I turned in the required paperwork, and I turned in all of the documents called for—financial statements, articles of incorporation, stock certificates.

Senator DeConcini. All that is asked for by the tribe?

Mr. Begay. That's asked for by the Bureau of Indian Affairs, and also by the——

Senator DeConcini. By the BIA.

Mr. Begay. And also the HUD office.

Senator DeConcini. By both agencies.

Mr. Begay. Yes.

Senator DeConcini. And you satisfied all that.

Did anybody ask you any questions, or you just had a list of documents that you're supposed to turn in?

Mr. Begay. That was the list of documents that I turned in. It satisfied their inspection, and I was certified.

Senator DeConcini. Now, realizing that it's hearsay, your experience with other companies up there—can you give us an example? How does a front work?

You gave us the example of how they came to you. Do you know a company up there that is a front?

Mr. Begay. Do I know a company in Phoenix that's a front?

Senator DeConcini. Yes; that works on the reservation?

Mr. Begay. Yes, sir; I do.

Senator DeConcini. And is that—there is an Indian or a native American involved in that particular company?

Mr. Begay. That's correct.

Senator DeConcini. And that native American doesn't own the company in actuality?

Mr. Begay. As I said before, Senator, the ownership is easily done on paperwork.

Senator DeConcini. But the real ownership——

Mr. Begay. The real ownership, the end control would be held by the company that is bonding.

The financial risk is being taken by a parent company. He's putting his bond line out at risk, so he would want to control the company, in order to not risk his bond.

Senator DeConcini. So he wants to be able to say yes or no.

Mr. Begay. That's correct.

Senator DeConcini. He wants to be able to say yes or no on taking the contract, and the ultimate bid that is submitted?

Mr. Begay. That's correct.

Senator DeConcini. The non-Indian?

So what is it that binds them? Do they have hidden agreements, or agreements that they don't share with the BIA? Do you know?

Mr. Begay. The agreements are hidden.

These are agreements—agreements that are required to qualify are submitted, and they're laid on top of the table.

The real agreements on how the money is split are in the back pocket.

Senator DeConcini. You're talking about how, say, a joint venture agreement is laid on the table?

Mr. Begay. That's correct.

Senator DeConcini. Where the native American and the non-Native American—but the real owner—have a joint venture agreement, and it says certain things in it.

That's laid on the table, and is approved by BIA or HUD or whomever it is?

Mr. **Begay**. That's correct.

Senator **DeConcini**. Then you're saying that there is a separate agreement. And do you know of any of these agreements?

Mr. **Begay**. I was telling you earlier about the profit margin that I was offered.

Senator **DeConcini**. Right.

That's the type of agreements you understand are prevalent in these fronts.

Mr. **Begay**. That's correct.

There are other forms. In my situation, it was a general contracting joint-venture agreement. There are construction management agreements, which would have different parameters, different splits on the profits.

Senator **DeConcini**. Yes.

Is it your opinion that if those agreements that are not presented to the regulatory authority were presented, they would not qualify then?

Mr. **Begay**. That's correct.

Senator **DeConcini**. Have you had an opportunity to discuss this problem with HUD or BIA, at any length, or any time?

Mr. **Begay**. I have mentioned it to contracting officers in Phoenix. Never was there any serious, formal applications or letters of protest. We discussed it, I've discussed it with HUD officials, and this is where the remark comes in— we've got our hands tied. We can't enforce it—what do we do?

Senator **DeConcini**. That's the response that you get from, say, HUD officials, or BIA officials?

Mr. **Begay**. Yes, sir.

Senator **DeConcini**. What do they mean, they have their hands tied?

Mr. **Begay**. I assume that means that they don't have the authority to pursue investigating these situations.

Senator **DeConcini**. Yes.

Mr. **Begay**. Or that they're limited in their ability to bring forth these situations through audits or whatever other means that are necessary in order to trace the dollar from the Federal Government through the accounting system of the construction company down to the Indian owner, to see in actuality if he is getting 51 percent or 1 percent.

Senator **DeConcini**. Now, you have supplied the committee with the particular names of various companies, is that correct?

Mr. **Begay**. There was nothing that I could prove.

However, as I was saying before, street gossip in my industry is fairly reliable, and from obvious observations on certain instances, it was too obvious that that existed.

But yes, I did give some certain names to the commission, and they followed up on it. As I understand, almost all of them were front companies.

Senator **DeConcini**. Now, you say that the environment, the business environment on the Navajo Reservation is not conducive for you working there. Is that also generally accepted in the building contracting business, that it's a hostile environment?

What is the atmosphere in the trade?

Mr. Begay. Well, the nature of our business is competitive. We need to know about our competitors.

On bid day, we need to know who's bidding each project, and the kind of history they have in bidding certain jobs. They either have a history of lowballing it, or they have a history of coming forth with reasonable prices.

So in our industry, we have a network that is fairly reliable. I don't know if I'm answering your question or not.

Senator DeConcini. Well, is it—what is that network saying about doing business on the Navajo Reservation?

Mr. Begay. The network says that if you're going to do business on the Navajo Reservation, you'd better have a pretty good markup in order to go through all the pains and regulations that exist there, the different controls.

The general impression is that someone is always on the take up there on the Navajo Reservation, and I'm sure this might exist on other reservations.

I've worked on other reservations, and I've worked on my own reservation. I would say that there's a lot of people on the take.

Senator DeConcini. It's not just the Navajo Reservation that has this climate of having to put in a high bid in order to pay the costs of doing business there?

Mr. Begay. I have not experienced that on other reservations.

Senator DeConcini. When you say the problem of doing business—you're talking about paying fees to people, in order to get permits and get permission, and awards—to be awarded the contracts?

Mr. Begay. I went through one contract that was funded partially by HUD and partially by the Navajo Tribe. In order to—well, not in order to, but I was approached by certain members of a committee that approved the contracts to donate to a certain rodeo, or to a certain function. That's commonplace.

Senator DeConcini. That's commonplace.

And that is by committee—you mean the committee that has the authority to award the contract?

Mr. Begay. That's correct.

Senator DeConcini. Individuals on the committee would indicate that you needed to buy tickets or fund some advertising, do something that they wanted you to do for some benefit of theirs?

Mr. Begay. That's correct.

And it's uncomfortable for me, a Navajo Indian general contractor, trying to do business the way business should be done, to end up in a situation like that where I have to make a choice.

Senator DeConcini. Of course you've chosen not to do that.

Mr. Begay. I've chosen not to do that, and that's probably one of the reasons why I don't work up there. I haven't bid work up there for the past three years.

Senator DeConcini. You have not?

Mr. Begay. That's right.

Senator DeConcini. Are you doing other work now?

Mr. Begay. I've been working in the Scottsdale area—we're building condominiums and townhouses for the private sector.

Also we're doing work for the Bureau of Indian Affairs, primarily private work at this time.

Senator DECONCINI. And are you able to get bonding for those projects?

Mr. BEGAY. Yes, sir; I have bonding. But it is not of the form that I would like to have.

Senator DECONCINI. Yes.

Mr. BEGAY. I would like to have a Treasury-listed bond, a corporate bond. That's the premium.

Senator DECONCINI. Just because it costs less to have that? Is that it? What's the difference between the bonds, premium and what have you?

Mr. BEGAY. The premiums are less.

Senator DECONCINI. The premiums are less?

Mr. BEGAY. The premiums are less.

Senator DECONCINI. Because of your rating?

Mr. BEGAY. That's correct.

You go through an evaluation process, the corporate bonds are more selective in who they bond. You can bid any job—private, State, Federal.

They're just premium bonds.

Senator DECONCINI. Now, is your company still a sole proprietorship? You're the owner of it?

Mr. BEGAY. That's correct.

Senator DECONCINI. Thank you.

I have no further questions.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

I think that it's well to point out here that what we are discussing is the issue of hundreds of millions of dollars a year for contracts that are let for various construction projects to do with Indians in this country.

The Congress intended, I think with the support of the American people, that Indians should receive preference in these contracts so that they could take part in the free enterprise system in this country, and indeed prosper and have an opportunity to compete, particularly those like Mr. Begay, who decided to go out on his own and try to provide certain services, not only to Indians, but to the State of Arizona.

I happen to have known Mr. Begay for some years, and I know of his previous work on the Navajo-Hopi relocation efforts, as well as seeing his quality of work in construction. I know him to be a hardworking, legitimate businessman who turns out a quality product.

I think that he's an example here of a person who, because of a set of unacceptable circumstances, is indeed prevented from competing in an area where he should be competing, and if the intent of Congress were true, his business should be—if the intent of Congress were carried out, his business should be enormously larger than it is today.

He would have been able to compete for Indian contracts which have been taken by so-called front organizations, which are indeed not Indian at all, but have hired an Indian.

In some cases, I think that testimony will show that from time to time, these Indians have been hired for a certain project and then abandoned, and left in a worse economic condition than they were before the enterprise began.

I'm intrigued, Mr. Begay, that you would have asked HUD and BIA authorities to come and examine your status and the way you do business, and they chose not to do so.

Did they give any reason for making that choice?

Mr. BEGAY. No, no reason.

It was just an open offer to come and visit our office, and that was a sincere offer to show them what we did, what we were doing.

Senator MCCAIN. To your knowledge, have you ever heard of a HUD or BIA authority ever visiting the establishments of any other contractors who do business, as far as Indian contracts are concerned?

Mr. BEGAY. No, sir.

Senator MCCAIN. Do you think that you would have heard if they did? At least over the years?

Mr. BEGAY. They may have. I really don't know, Senator, whether they have or not.

Senator MCCAIN. But you've never heard of it?

Mr. BEGAY. I've never heard of an incident where they did.

Senator MCCAIN. Well, do you think that if it had not been for these front companies which you identified to the committee, that your business would be significantly larger, and that you would also have employed, or been able to employ, larger numbers of native Americans?

Mr. BEGAY. Yes, sir.

The number of Indian fronts out there, and the prices at which they took the jobs restricted me from being awarded some of these projects in our program.

I am an American Indian, and I was born and raised on the Navajo reservation. I grew up in a hogan, I herded sheep, and I did all the things that my people do.

I graduated, and I went through the Bureau of Indian Affairs School System, Presbyterian school, and graduated from public school.

I think I have a compassion for my people, and the American Indians. Our program in the company is to subcontract as much of the work as we can to Indian subcontractors, and we do hire Indian craftsmen.

Senator MCCAIN. Well, Mr. Begay, I think that it is our obligation to try and see that the intent of Congress is carried out, and that is that you and other native Americans who have taken great risks in order to enter the free enterprise system at least are given a level playing field.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator.

Do you have any suggestions—besides the bonding—that could be done to see that the implementation of Indian contracting is carried out in a proper way, without fronts? Is bonding really the key? If there was a program that could provide legitimate bonding for legitimate Indian contractors, would that solve the problem in your judgement?

Mr. BEGAY. Bonding would probably solve 80 to 90 percent of the problem.

Senator DECONCINI. So that's the biggest problem?

Mr. BEGAY. Yes, sir.

Senator DeConcini. I join Senator McCain, Mr. Begay, for thanking you and your wife for traveling all this way from Arizona, and for meeting with our committee staff people over the past several months, and helping us.

You have a sterling reputation on and off that reservation, regardless of who is Chairman and who isn't. You have a great heritage to be proud of, and I thank you for helping the committee understand the legitimacy of the Indian contracting program.

Mr. Begay. Thank you, Senators, and I wish you a lot of luck in your work.

Senator DeConcini. Thank you.

Mr. Begay. Thank you.

Senator DeConcini. Our next witness will be Mr. Ed Danks.

[Witness sworn.]

Senator DeConcini. Mr. Danks, would you please state your name and your residence for the record?

STATEMENT OF EDWARD DANKS, PRESIDENT, NATIONAL INDIAN CONTRACTORS' ASSOCIATION; OWNER, EAGLE NEST CONSTRUCTION, ND

Mr. Danks. My name is Edward Danks. I live at Bismarck, ND.

Senator DeConcini. Thank you, Mr. Danks.

I'm going to ask Counsel Sollers to do the questioning, please.

Mr. Sollers. Good morning, Mr. Danks.

Mr. Danks. Good morning.

Mr. Sollers. Mr. Danks, where did you grow up?

Mr. Danks. I grew up in Mandaree, ND, which is on the Fort Berthold Indian Reservation in North Dakota.

Mr. Sollers. Did you attend school?

Mr. Danks. Yes; I did. I attended BIA schools until I was a sophomore in high school, and then I went to a Catholic boarding school.

Mr. Sollers. Are you a war veteran?

Mr. Danks. Yes; I am.

Mr. Sollers. In the U.S. Marine Corps?

Mr. Danks. Yes.

Mr. Sollers. Are you an enrolled member of a Federally recognized Indian tribe?

Mr. Danks. Yes; I am.

I am an enrolled member of the three affiliated tribes of Fort Berthold.

Mr. Sollers. What is your profession, sir?

Mr. Danks. I am the owner of a construction company, along with two brothers of mine, and I serve as president of the National Indian Contractors' Association.

Mr. Sollers. What is the name of your company?

Mr. Danks. The name of my company is Eagle Nest, Inc.

Mr. Sollers. How many employees do you currently have?

Mr. Danks. Right now we're down to about 25 people, but in the seasonal nature of the construction business in the northern tier—we get up to as many as 200 people.

Mr. Sollers. Of that number, what percent is native American?

Mr. Danks. About 86 percent.

We've kept statistics on our employment dollars that have gone back to the native American community since the beginning of our operation.

Although 86 percent of our people are native Americans, we do have some non-Indians who are working for us who are married to native Americans. As a result, 95 percent of our employment dollars go to the benefit of native Americans.

Mr. **Sollers**. How long have you been in the construction industry?

Mr. **Danks**. As an owner, I've been in the construction business since 1973.

My father, who was a World War II veteran with the Navy, was involved in the restoration of the Island of Guam, and got some construction experience there.

When he got out of the Navy, he came back to Fort Berthold, and was asked to do some work for the Bureau of Indian Affairs—some construction work.

He took me out into the field when I was 9 years old and showed me how to run a Cat. So I've been involved in construction activity since I was about 9 or 10 years old.

Mr. **Sollers**. When did you form Eagle Nest Construction?

Mr. **Danks**. Eagle Nest Construction was formed in 1974.

I operated—in late 1974—I operated the first part of 1974 as a sole proprietor. I hired my brother to work for me, and that relationship didn't work out too good. So we decided that he should be my partner.

After a period of time, we had another brother who thought this was a good deal, so we formed a corporation. So we formed our corporation in 1974.

Mr. **Sollers**. Do you perform Indian preference or Indian set-aside work?

Mr. **Danks**. Yes.

Mr. **Sollers**. Last year, what amount of construction work did you do?

Mr. **Danks**. Our gross sales last year was $6.2 million.

Mr. **Sollers**. What percentage of that work was Indian preference or Indian set-aside?

Mr. **Danks**. About 95 percent of that.

Mr. **Sollers**. For what Government agencies do you perform Indian preference work?

Mr. **Danks**. The Bureau of Indian Affairs, the Indian Health Service.

I have done some housing work, but that was back in the late 1970s.

Mr. **Sollers**. Was that for HUD?

Mr. **Danks**. Yes.

Mr. **Sollers**. Any SBA work?

Mr. **Danks**. We were an SBA certified firm, and we did do some SBA 8(a) work.

We worked for the Corps of Engineers, the U.S. Air Force, the Fish and Wildlife Service, and a variety of Federal agencies.

Mr. **Sollers**. Does each agency have its own individual Indian preference requirements?

Mr. DANKS. There is a difference in pre-qualifying as an Indian owned firm, particularly between the Bureau of Indian Affairs, Indian Health Service, and HUD—although I do believe now that the Bureau of Indian Affairs requirement and the HUD requirements are compatible.

But the Indian Health Service requirements are different.

Mr. SOLLERS. Has there been confusion over the years as between the agencies' preference requirements?

Mr. DANKS. Oh, absolutely.

Mr. SOLLERS. Does that cause problems for you as a contractor?

Mr. DANKS. Absolutely.

Mr. SOLLERS. Are certifications required from individual agencies as to your Indian-owned status?

Mr. DANKS. Yes; there are.

Mr. SOLLERS. Do those certifications also vary?

Mr. DANKS. Very much so.

Mr. SOLLERS. Now, Mr. Danks, since the enactment of the Indian Preference programs, have you observed the emergence of Indian fronts set up by non-Indian contractors?

Mr. DANKS. Yes; I have.

Mr. SOLLERS. And just briefly, if you would—describe what a front is.

Mr. DANKS. A front is a term that's loosely used to define a joint venture.

Particularly, a front is used to identify a joint venture that's put together to take advantage of a particular market. Ordinarily what happens is, in the Indian construction community, there is an Indian who owns the company. The required degree of ownership—be it 51 percent or 100 percent—behind the scenes there's a joint venture that's put together that actually gives the non-Indian the control of the operation.

That's sort of loosely defining what a front is.

Mr. SOLLERS. Is it the case that the Indian front frequently does not participate in the profits?

Mr. DANKS. That's true.

Mr. SOLLERS. Then is it often the case that the Indian front will simply be paid a fee, wage, or salary in order to help non-Indian firms qualify for an Indian preference program?

Mr. DANKS. I don't know the specific case, but that's the general attitude.

Mr. SOLLERS. Now, with regard to your National Association of Indian Contractors, and I take it you were one of the founding members?

Mr. DANKS. Yes; I was.

Mr. SOLLERS. What did you observe with regard to that association after Indian preference laws came into being and really gained strength?

Mr. DANKS. As a result of the Surface Transportation Assistance Act of 1982, the Bureau of Indian Affairs road construction budget went from $40 million a year up to $100 million a year.

As a result of that, there was a tremendous interest that was generated to do BIA work. Our association was founded, started in the fall of 1983, a year after the Surface Transportation Assistance Act was passed.

Those of us who had been in business prior to *Glover* and prior to the Surface Transportation Assistance Act of 1982 were ecstatic about the opportunity to bid work again under the Buy Indian Act.

Mr. **Sollers**. Just briefly, what was *Glover*? You referred to *Glover*. That's a Supreme Court decision?

Mr. **Danks**. That's a Supreme Court decision that in effect terminated the use of the Buy Indian Act for road construction projects in Indian country.

Mr. **Sollers**. Then I take it the Buy Indian Act was reinstated for the road construction work, is that right?

Mr. **Danks**. That's correct.

There was some enabling legislation in the Surface Transportation Assistance Act to allow the builders to use the Buy Indian Act in every State but the State of Oklahoma.

Mr. **Sollers**. And once that happened, what happened with regard to your association's membership?

Mr. **Danks**. Well, prior to the Surface Transportation Assistance Act of 1982, there was not a National Indian Contractors' Association.

Several of us contractors who had been in the business for a period of time decided that we need to form an association, because we can see some danger. We could see some dangers coming down the road, and we thought that we needed a forum through which we could speak to express those concerns which we had.

Mr. **Sollers**. Did your association grow substantially once those funds became available?

Mr. **Danks**. Absolutely.

We went from probably 30 or 40 firms to as much as 300 or 400 firms in the period of about 1 year.

Mr. **Sollers**. Is it your belief that a number of those firms are illegitimate Indian fronts?

Mr. **Danks**. Yes.

Mr. **Sollers**. Is it also your understanding that a number of the companies that joined your association used the fact of their enrollment in your association to benefit themselves with regard to various Federal Agencies?

Mr. **Danks**. Absolutely.

That was one of the most devastating things that the Board of Directors, and those of us in the association, found happening to us—that these firms were taking their enrollment in the National Indian Contractors Association and representing it to be some form of certification or legitimization of their operation. It caused us a great deal of concern.

Mr. **Sollers**. And they would legitimize their operations to whom?

Mr. **Danks**. Representing themselves to various contracting agencies as being Indian contractors by virtue of the fact that they had joined the National Indian Contractors' Association.

Mr. **Sollers**. And by contracting agencies, you're referring to what agencies?

Mr. **Danks**. Those agencies who require Indian ownership, Indian certification, Indian pre-qualification, as it were, to get Indian set aside work.

That's the Bureau of Indian Affairs, the Indian Health Service, HUD, a variety of other Federal agencies.

Mr. **Sollers.** Did you yourself try and screen the companies who were joining your association?

Mr. **Danks.** We made an attempt to do that, but we just didn't have the staff or the manpower or the funds to do that.

Mr. **Sollers.** Whose job it is to screen the Indian company?

Mr. **Danks.** In our opinion, it's the job of the contracting officer—the people who advertise and let the contracts. We believe it's their responsibility.

Mr. **Sollers.** Under the system that's currently set up, is there enforcement of the Indian preference program?

Mr. **Danks.** I have been in business now for 15 years. I'm entering my 16th year of business in the Indian contracting community.

I only know of one firm, during that period of time, who was decertified because it did not meet the eligibility requirements—and that was done by the Indian Health Service.

As far as the enforcement of the regulations, pursuing obvious fronts—I don't know of a concentrated effort to do that.

Mr. **Sollers.** Has anyone ever looked at your books?

Mr. **Danks.** The only people who have ever come to my office—and I have invited them several times, because we're quite proud of what we do, and we're quite proud of our track record—the only people who have ever been to our office was the SBA people, during the 8(a) certification process.

As far as Bureau of Indian Affairs personnel, the contracting officer type personnel, Indian Health Service personnel, HUD service personnel—they've never been to our office.

I wish that they'd come. I'd like to show them our operation.

Mr. **Sollers.** In your opinion, is fronting a pervasive problem?

Mr. **Danks.** Yes; it is.

Mr. **Sollers.** Have you seen companies emerge with no contracting experience that are suddenly bidding million dollar projects?

Mr. **Danks.** Yes.

Mr. **Sollers.** What conclusion would you draw from that?

Mr. **Danks.** The contracting industry—the bonding industry and the insurance industry, all the things that Indian contractors are still required to meet, insofar as contracting with the Government—they're controlled by the Federal acquisition regulations.

Those sorts of things take time. The comfort level of bonding people, the comfort level of insurance people, the comfort level of the finance people takes time to develop. Somebody who pops up overnight able to bid $3, $4, $5 million worth of work—the suspicion is heightened substantially that that is not necessarily a legitimate operation.

Mr. **Sollers.** Now, Mr. Danks, as presently structured, what do you see as the effects of the Indian preference program?

Mr. **Danks.** I think the program is well-intended, and I think the program is necessary.

But the current effects of it—there's a scattered type of implementation of the Indian preference program as it exists today. There are varying degrees of interpretation of what the regulations say, and what the law is.

Mr. **Sollers**. Does the current system create a lot of illegitimate Indian companies?

Mr. **Danks**. The recent certification package sent out by the Bureau of Indian Affairs seems to play the game of "catch us if you can."

The certification process is a matter of a declaration on the part of the Indian company that says yes, I am certified. It's a two-page certification form that has to be filled out, and then it's a problem. I mean, there just doesn't seem to be a consistent, thorough review if this is in fact a certified Indian firm, according to the regulations.

Mr. **Sollers**. It's basically a self-certification, is it not?

Mr. **Danks**. Absolutely.

And the only way it can be challenged, as I understand the regulations, is if another contractor, Indian contractor protests the eligibility of that particular firm.

Mr. **Sollers**. Are you aware of whether or not BIA even investigates those protests?

Mr. **Danks**. I can't with exact knowledge say that I know that they have or haven't.

I don't know of any, and I'm sure they would have been brought to my attention.

Mr. **Sollers**. And are you aware, also, that the BIA has reduced its requirement of Indian-owned status from 100 percent to 51 percent?

Mr. **Danks**. Yes; I am aware of that.

Mr. **Sollers**. What do you believe the effect of that reduction is?

Mr. **Danks**. The effect of the reduction is—it's important to understand that the Bureau of Indian Affairs is only allowed to use the Buy Indian Act in the road construction business.

Now, the road construction business is an intensely capitalized business. A truck, a bulldozer, a motor grader—these are substantial investments.

Now, legitimate Indian contractors, over a period of years, have made that investment, and have made the commitments, financially and otherwise, to enter the business legitimately and maintain some form of legitimacy.

With the reduction in the ownership requirement, it opens up the possibility and the probability of several sham organizations getting into the business, and directly kicks the pins out from some of the smaller people who have been working through the years to protect that investment and protect that interest.

Mr. **Sollers**. In fact, will it encourage rather than help prevent the fronting problem that has emerged?

Mr. **Danks**. Well, the fronting problem—here's the way we look at it.

If it walks like a duck, if it quacks like a duck, if it swims like a duck, it must be a duck.

So if there's the necessity for joint ventures, that are legitimate and well-intended, then the joint venture process ought to be clearly defined and ought to be given a chance to help Indian people incubate—if that's the correct word—go through a mentor-protege process, if that's correct terminology of it—in order to get themselves established.

But just to merely reduce the ownership requirements to 51 percent and then not thoroughly police it—if that's the correct word—it's a joke.

I mean, it's just not going to accomplish the objective of what we think the law was intended to do.

That's kind of an interesting question, because over the last 10 years, the Buy Indian Act regulations have been modified, changed back and forth six or seven times. So we're not quite sure just what is the policy of the Congress, and what is the policy of the Bureau of Indian Affairs, what is the policy of the tribes.

What do we mean when we say the Buy Indian Act? There seems to be a whole variety, a whole mirage of definitions of what that meant, and what it was intended to accomplish.

Mr. SOLLERS. Are you saying that the goals of the Buy Indian Act and other Indian preference programs have never been coherently set forth?

Mr. DANKS. Absolutely.

Mr. SOLLERS. Now, are there other effects of Indian preference programs, such as the fact that non-Indian firms are bleeding or siphoning a lot of the profits from construction on the reservation?

Mr. DANKS. Without a doubt.

Mr. SOLLERS. How about the effects on small, Indian owned companies—and I take it you're relatively small anyway—such as Eagle Nest? Does it have an effect on you?

Mr. DANKS. Well, our finance people, our bond people, and our insurance people are risk managers.

When they look at Eagle Nest, they say, what is the risk of me making this particular company alone? What is the risk of my firm bonding this particular company?

They can look down the road and see—hey, wait 1 minute. These regulations are going to change. What I thought was a protective, incubative market for my particular client has now changed. I'm not so sure that I want to get involved in the risk of supporting this client.

Something can happen to his market that completely offsets his ability to repay me, and that completely offsets his ability to function in a safer environment than what currently exists.

It has a tremendous effect on the small, Indian-owned companies.

I used to think that the reason for the bankers, the bonders, the insurance not getting involved with Indian companies was somehow or another tied to some racial attitude or some prejudicial attitude. But as I've grown into business, and Lord help me, I think that I've gained some experience and insight—I'm beginning to truly understand that it's a matter of risk management.

With this variety of regulations and the ability to subvert the regulations, I can understand their concern.

Mr. SOLLERS. Are you facing competition in your Indian preference work from companies that have large economies of scale?

Mr. DANKS. Yes.

Mr. SOLLERS. These are non-Indian companies that are utilizing an Indian front?

Mr. DANKS. Yes.

Mr. SOLLERS. Do you find yourself being underbid frequently by these companies?

Mr. Danks. It's important to remember that most of the reservations probably once every two or three years actually get a road construction project in the Bureau of Indian Affairs.

A lot of the companies, non-Indian companies are either adjacent to, in some reasonable geographic location to a reservation—that they can underbid a project, take it away from a legitimate Indian contractor, and in effect put him out of business.

Now, the regulation says that if there are not at least two qualified Indian contractors, at the discretion of the Secretary of the Interior, he can open the bidding up—make it a non-restricted bid.

So any contractor then could bid on a contract in Indian country.

We're talking about a fairly substantial market here. The viability of Indian contractors is in direct opposition to the long term interests of well-established, long-term non-Indian contractors, because that market—if Indian contractors survive, that market is no longer available to them.

Mr. Sollers. As it stands now, non-Indian contractors are attempting to find a way to grab a piece of that Indian preference market, is that right?

Mr. Danks. That's the perception, yes.

Mr. Sollers. What is the effect on the reservation economies of these non-Indian firms taking a lot of the construction work?

Mr. Danks. Well, the dollar doesn't stay there on the reservation as it was intended to stay there and do. And we all know the multiplier effect of a dollar in a particular economy.

Indian contractors—the legitimate Indian contractors—are the people who contribute to Boy Scouts, that contribute to their churches, that contribute to their pow-wows, that contribute to their school systems, et cetera.

The effect of letting this type of operation continue on has an obvious consequence—the dollars don't stay home.

Mr. Sollers. Does it also have an effect on employment on the reservation?

Mr. Danks. Yes.

Mr. Sollers. So frequently a non-Indian firm that is utilizing an Indian front will bring in its own non-Indian crews to do the work on the reservation?

Mr. Danks. I don't believe that that's necessarily the case.

I think that there are employment—if I may—that's where some of the difficulty comes in defining the Buy Indian Act, and the policy of it.

Other non-Indian contractors do employ, during the period of time that they're on the reservation, Native Americans. And there has been a philosophy espoused by various contracting officials—well, I don't care if they're legitimate or not, at least they're employing the people.

So it's not fair to say that they don't employ the people. I think that they do an adequate job in that regard.

But their record as far as employing people, native American people, compared to the legitimate Indian contractor—there's considerable marked difference.

Mr. Sollers. Now, is bonding a major issue for a fledgling or start-up Indian firm?

Mr. Danks. Absolutely.

Mr. Sollers. What about for you? Did you have problems obtaining bonding?

Mr. Danks. I was in business from 1974 to 1976 before I got my first bond. We got a $30,000 bond, and you should have seen the party we threw in celebration of that.

I mean, the bonding problem is an immense problem.

It's important to understand that although Indian contractors have some preferential consideration, they are still held to the requirements of the Federal acquisition regulations, in that they do have to have a bond and they do have to comply with a whole barrage of Federal acquisition regulations in order for them to get a bond.

Mr. Sollers. Did you have to take certain steps to increase your bonding?

Mr. Danks. Oh, yes.

Mr. Sollers. What did you have to do?

Mr. Danks. Well, bonding companies typically look at the three C's, I believe they call it—they look at credit worthiness, they look at your capital, and they look at your capacity and your experience to actually build the kind of work that you want to build.

And you have to develop some form of track record in order to be considered for a bond. It's a risk, it's a risk venture on the part of the bonding company.

Mr. Sollers. Did you actually have to move off the reservation to increase your bonding?

Mr. Danks. Yes.

That was one of the things that is a very important point to make here.

Bonding people and finance people, insurance people look at a barrage of regulations and a barrage of laws that apply in Indian country that delve into questions of sovereignty, delve into questions of universal uniform commercial code activities.

They take a look at that, and if you're located on the reservation, and are marginal, or a first-generation or a young contractor, they look at that and say, you know, if you do have a problem, if we do have to go and repossess, the likelihood is that I need to go though the tribal court system, and it will go through some complicated Federal process to get access to my recovery.

They have enough business. They don't need our business. And so their attitude is, why take that risk?

Mr. Sollers. And they cannot, they believe, attach effectively or easily any of your equipment and so on, while it's on the reservation?

Mr. Danks. That's correct.

It's important to also mention that the SBA has a 90-percent bonding guarantee program, and I think that sometimes that's misunderstood.

The bond guarantee only comes into effect on the loss. SBA guarantees to the bonding company, we will pick up 90 percent of your loss.

Now, the bonding company says, "Well, what good does that do me? I don't want to have a loss." So why mess with it?

You first have to have a bond company willing to write the bond. Then the guarantee process comes in, and it only guarantees the loss.

Mr. **Sollers**. Is there a proposed regulation right now that is going to have a significant effect for Indian companies in the bonding area?

Mr. **Danks**. Yes.

There are two forms of bonding that can be used in Federal projects.

One, of course, is your standard corporate surety, listed on the Circular 570.

The other form of bonding that has had some success for native American firms in particular is the use of individual surety.

Mr. **Sollers**. That's sort of like a Lloyds of London deal, where people will get together and they'll insure you?

Mr. **Danks**. Yes.

Now, their fees are higher than the corporate surety, but they recognize a greater risk and in turn they are generating a greater return for their risk.

Now, there are some regulations that are currently being proposed, and the policy has already been implemented to restrict the use of these individual surety groups, to the point where it's going to make them almost non-existent.

Those restrictions are going to be so tough that the individual surety market is going to go away.

Mr. **Sollers**. What effect will that have on native American companies?

Mr. **Danks**. I would guess that it would take about—these are rough terms—I would guess that 60 to 70 percent of our native American, legitimate native American firms are just going to be out of business, irrespective of if there's a good Buy Indian Act or not.

If they can't generate the bonding to participate, they're out of business.

Mr. **Sollers**. By "legitimate," you mean a company that does not have a non-Indian backer?

Mr. **Danks**. Right.

I would think that if that continues on the path where it's headed, we're going to see a proliferation of fraudulent companies.

Mr. **Sollers**. Now, Mr. Danks, most tribes have instituted Indian preference programs of their own, is that correct?

Mr. **Danks**. Yes.

Mr. **Sollers**. Has that also, in conjunction with the various agency regulations, created a fair amount of confusion for you as a contractor?

Mr. **Danks**. Absolutely.

My brothers and I, in our company—we've worked on every reservation in North and South Dakota, with the exception of one. We've worked on the Colville Indian Reservation in Washington, I've worked on the Navajo Reservation, I've worked on the Laguna Pueblo—several different reservations throughout the country—all of whom have varying interpretations of Indian preference and what it means, and all of them having a variety of standard operation procedures of how they implement those.

By whim or by worship, at times.

Mr. **Sollers**. Do you believe there should be one standard of Indian preference under which you should operate?

Mr. **Danks**. Yes.

Mr. **Sollers**. Now, you've had some involvement, have you not, with what are called TEROs?

Mr. **Danks**. Yes; I have.

Mr. **Sollers**. What is a TERO?

Mr. **Danks**. A TERO is defined as Tribal Employment Rights Organization.

Mr. **Sollers**. What is their function?

Mr. **Danks**. Their function, as I understand, is to see that the provision of section 7(b) of Public Law 93-638, the Indian Self-Determination Act, is properly complied with by contractors or business people who do business within the confines of their tribal jurisdictions.

Mr. **Sollers**. What has been your experience with the TEROs?

Mr. **Danks**. Well intended, well meant—but again there's a confusion as to what TERO is actually supposed to do, and there seems to be very little consistency across the country as to what that means.

You know, there are a variety of different ways that TEROs operate.

Mr. **Sollers**. Have you had pressure applied to you by various TERO officers?

Mr. **Danks**. Yes.

Mr. **Sollers**. What type of pressure?

Mr. **Danks**. Hire my son, and you'll have quicker approval of your subcontracting plans.

Mr. **Sollers**. Have you ever had your equipment threatened if you did not hire a certain individual selected by a TERO officer?

Mr. **Danks**. Yes.

Mr. **Sollers**. Have you ever failed to hire the people designated?

Mr. **Danks**. Yes.

Mr. **Sollers**. What was the result?

Mr. **Danks**. Ouch.

Mr. **Sollers**. Did you have your equipment tampered with?

Mr. **Danks**. Yes.

Mr. **Sollers**. Mr. Chairman, that concludes my questions.

Thank you.

Mr. **McCain**. Thank you for some very important testimony Mr. Danks. You testified earlier that there was a significant increase in the membership of your organization after legislation was passed concerning Indian preference?

Mr. **Danks**. Yes, sir.

Mr. **McCain**. You said that you went from just a handful to around 300 or so, is that right?

Mr. **Danks**. That's correct.

Mr. **McCain**. 200 or 300, just as a ballpark figure. I know that it's very hard to nail down, but what percentage of that 200 to 300 do you think were front organizations?

Mr. **Danks**. It would be a very rough estimate.

Mr. **McCain**. Around 40 percent? 50 percent?

Mr. DANKS. Perhaps 40 or 50 percent of those were front organizations.

Mr. MCCAIN. Right.

Mr. DANKS. It's also fair to assert that a lot of the people or firms that are in the Indian Contractors' Association are small, mom and pop type operations that have a dump truck, and they make their living with a couple of dump trucks.

Mr. MCCAIN. So it was your impression that 40 or 50 percent of those contractors who joined your organization were front organizations? But that only tells part of the story, because as you say, most of the legitimate Indian contracting organizations, business, were small businesses?

What percentage of the contracts, in the next few years, do you think went to so-called front organizations? Again, I recognize that it's very difficult for you to be precise. A larger percentage than the number of front organizations?

In other words, my point here is, were they getting the majority of the contracts because they were larger and more capable of competing than the small Indian owned businesses?

Mr. DANKS. Yes, sir.

A lot of the members of the Indian Contractors' Association were subcontractors, and so there is a proportionate relationship here. I think if I understand your point, there is a proportionate relationship of the work that is done to the non-certified or sham operations.

Senator MCCAIN. My point is that it's appalling that 40 to 50 percent of the members of your organization would be front organizations, but it's even more compelling that they probably received a much larger percentage of these contracts because of their ability to attain them.

Is that an accurate statement?

Mr. DANKS. Yes.

Senator MCCAIN. So do you think that the percentage of contracts was significantly large, that was attained by a front organization as opposed to legitimate Indian companies?

Mr. DANKS. Yes, sir.

Again, the Buy Indian Act is only applied by the Bureau of Indian Affairs right now to road construction projects, and a road construction project by nature generally is a large project.

Many of our folks and our associations just couldn't bond a project of $1 million or better—in most cases, maybe a half million dollars or better.

Senator MCCAIN. You testified that when it is a "front" organization—and I understand your definition—when it is a front company, they do hire Indians to do some of the work.

Is there a significantly less number of native Americans who are hired than would have been hired by a legitimate company?

Mr. DANKS. I can use my company as an example.

When we finish a job on a reservation, and we have a State of North Dakota job to go to, we take those people with us to that job, to do that project for the State of North Dakota.

So our native Americans go with us wherever we go. In a sham situation, I believe the employment stops at the reservation line, in most cases. And so the continual development of employees and the continuing employment dollars is reflected in that.

Senator McCAIN. When the contracting company hires a subcontractor, are those generally also less native Americans by the subcontractors than, say, you would hire, were you letting the subcontract?

Mr. DANKS. We have a very good program—to answer your question, yes.

But we have an incentive program in the Aberdeen area, that the Bureau of Indian Affairs has initiated. We get an incentive for the number of fellow native American subcontractors that we hire, and it works great.

Senator McCAIN. You have never known of a single Federal agency, whether it be BIA, HUD, IHS, or any Government agency that you have dealt with that has come to your company and said, "Let me see how you operate?"

Mr. DANKS. With the exception of the Small Business Administration.

Senator McCAIN. The Small Business Administration did come?

Mr. DANKS. They came to our office, and they went through it from stem to stern, and branded us "good" when they were done.

We felt real good about what was happening.

Senator McCAIN. But no other government entity that you've done literally tens of contracts with has ever come to inspect your books?

Mr. DANKS. No.

Contracting officer types?

Senator McCAIN. Yes.

Mr. DANKS. It's important to remember, we've had BIA road engineers, and BIA people have come to our operation and talked with us freely and openly, and looked at our operation.

But as far as contracting officer types, we haven't had any.

Senator McCAIN. Let me just get this straight one more time—you believe that 40 to 50 percent of the new contractors that joined your association were basically sham operations? Is that correct?

Mr. DANKS. To my best judgement, yes.

Senator McCAIN. But you also state that as far as dollars are concerned, a significantly larger percentage of dollars went to these sham operations, because they had the capability of obtaining bonding and capitalization and everything else, as opposed to the small Indian businessman? Is that accurate, also?

Mr. DANKS. That's correct.

Senator McCAIN. Thank you.

Thank you, Mr. Chairman.

Senator DECONCINI. Thank you, Senator McCain.

Let me just ask you one question.

On the certification, Mr. Danks—in that process, I haven't seen the forms.

Is there an affidavit under oath that you have to sign?

Mr. DANKS. Just a signature.

I believe it is—my papers are kind of mixed up right now, but I believe it is.

Senator **DeConcini**. You believe it is that you swear that the information given on this self-certification is true, and what have you?

Mr. **Danks**. Yes, sir.

In fact, if I may for the record, sir, we recently, in my office, received a copy of a memorandum from the contracting officer in the Aberdeen area, relative to the Buy Indian act, which sets forth the form to be used for qualifying under the Buy Indian act.

There's an interesting paragraph that I would like to put into the record. It says:

> For new solicitations under the act, offerors will have to self-declare that they are eligible to participate. Consequently, the Bureau of Indian Affairs will no longer certify Indian firms as has been done in the past.

And that's the new standard.

Senator **DeConcini**. Which means total self-certification?

Mr. **Danks**. Yes, sir.

Senator **DeConcini**. Yes.

Mr. Parker is here from the Select Committee on Indian Affairs, on behalf of Mr. Inouye, and would like to ask a question on the employment practices.

Mr. Parker.

Mr. **Parker**. Thank you, Mr. Chairman.

Good morning.

Mr. **Danks**. Good morning.

Mr. **Parker**. In your testimony, discussing the experiences that you've had with the Tribal Employment Rights Organizations, you refer to some problems in terms of the pressures which I gather from your testimony were inappropriate kinds of pressures that were applied upon you.

Do you have any idea whether that kind of practice is widespread, or would that be more the minority case?

Mr. **Danks**. I believe that's a minority case.

Mr. **Parker**. So, generally, in your opinion, the Tribal Employment Rights Organizations have been effectively representing the tribal members in trying to ensure that employment preference and training preference is adhered to by operators and private firms on reservations, et cetera?

Mr. **Danks**. That's correct.

There seems to be what I referred to earlier as probably more the exception than the general rule.

Mr. **Parker**. Now, as you describe the problems inherent in this whole system of self-certification of eligibility of Indian preference status, particularly now with the 51 percent rule, which allows for joint ownership of firms asserting an Indian preference—would you have an opinion as to whether the Tribal Employment Rights Organizations might be able to play an effective role in trying the distinguish the legitimate Indian owned and controlled and operated firms from the fronts? Given their knowledge of local conditions and local members and being an organization that is operating on the reservation community itself?

Mr. **Danks**. I think that they have a legitimate role to play in that process.

Mr. PARKER. For the record, your organization in conjunction with the national organization, the Council of Tribal Employment Rights Organizations, have recently contacted Senator Inouye as chairman of the committee and the ranking minority members Senator McCain, and have requested that they consider introducing legislation that would expand and address some of these problems in the Buy Indian Act Indian preference area.

It would also—the legislative proposal that we have been considering at a staff level on behalf of the Chairman and the ranking members would provide authority for the Secretary to turn over the policing of these preference issues to TEROs. I presume this would be under conditions where there was some assurance that the TEROS are going to do it effectively, in accordance with proper due process, et cetera.

Are you familiar with this legislative proposal, nationally, that the Contractors Association has been working on with the TERO organization?

Mr. DANKS. Yes.

Mr. PARKER. So your testimony today will be very helpful, and I certainly look forward to reporting back to Senator Inouye, about the very helpful testimony that's been presented here.

It would be up to him and Senator McCain to decide about moving forward with this legislation. Thank you very much.

Mr. DANKS. Thank you.

Sir, I'd like to make one comment, as far as the National Indian Contractors Association is concerned.

We have consistently, since 1983, offered suggestive comments to the Buy Indian Act—various changes at least once a year. Six or seven times—I have eight different times that we've offered comments on the Buy Indian Act.

With the exception of the latest legislation that's in the mill, we have not seen any of those things incorporated.

Now, we're the people that live with the regulations way out there in the hills, and yet it seems like we don't get to see the fruits of our efforts, and we're really excited about this particular hearing and this opportunity because we think that maybe where the rubber meets the road, things will happen.

At least we hope so.

Senator DECONCINI. Mr. Danks, you're talked about the TERO incident which you had, and I think that you're response was "ouch".

I take it from that that you had either actually witnessed some deprivation to your capability of doing business, or you were fearful of that, because you did not or would not comply with whatever they were asking you to do—the individual, not the organization. Am I correct?

Mr. DANKS. That's correct.

Those TERO directors sometimes can have a tremendous——

Senator DECONCINI. So it's an individual?

Mr. DANKS. Yes; it's an individual, not the program.

Senator DECONCINI. So, do you have suggestions that maybe you want to fly before us, as to how do you control that?

Do you think that should be subject to somebody's discretion, or not? Somebody's supervision or complaint process, to handle this sort of thing?

Mr. DANKS. Senator, in the preparation and the planning of a construction project on a reservation, there is a substantial amount of lead time prior to the actual bidding of the project.

During that lead time, we think it's absolutely imperative that the various rules and regulations and standard operating procedure that are going to be used by the TERO group or by any other group that will affect that prosecution of that contract be made a part of the contract documents, be made a part of the disclosures to the contractor so that they are prepared for it prior to the actual bid, rather than after that actual bid.

Senator DECONCINI. What concerns me—I don't know if you heard Mr. Begay this morning testify about the environment on some reservations, where you have to satisfy certain officials in order to get a favorable contract—and he has given us several examples which we will go over this afternoon, or maybe even this morning—I'm fearful that this is prevalent and inviting another situation.

If so, it sounds to me that this TERO has a good concept—do the employment right there, so that you know that they are legitimate Indians living on the reservation and going to work next Monday or whenever the job starts.

Do you have any thoughts on what you do to try to ensure that?

Mr. DANKS. Well, sir, it goes back to the philosophical approach of the various organizations that are involved with the Buy Indian Act.

I sometimes feel that the TERO organization in a general sense looks at the Buy Indian Act as an employment tool.

I think that sometimes the BIA credit people have a different philosophy, and the designers of the project look at it as a business building tool.

Somebody else might look at it as a training tool. There seems to be a variety of philosophy or theories, if you will, of what the Buy Indian Act actually is intended to do.

A TERO organization might look at it as a training tool. I as a contractor look at it as an incubation tool, if you will, and in order to be competitive and to be viable, the economies of my particular project won't allow me to do extensive training.

Senator DECONCINI. Are you saying that if the TERO group was more defined, and everybody had the same definition, and its purpose was to apply trained native Americans to work for you, or whomever got the contract, and not be in a position to be able to have any detrimental effect on your getting a contract—is that what you're saying?

Mr. DANKS. I'm having a hard time understanding the question.

Senator DECONCINI. Well, I'm trying to make a distinction here, that if the TERO program is part of the contracting, then it's guidelines have to be satisfied in order to get the contract in the first place.

Or, is it a supplier of trained people, that would help meet the standards that you have attested to, or have indicated that you will do?

Mr. DANKS. Senator, I think it's both.

And I'm not really sure—you know, I can't really nail it down. But I think in that general sense, it's both.

Senator DECONCINI. Thank you.

I have no further questions.

Senator MCCAIN. Just one more question, Mr. Chairman.

Is it correct to say that you've had several bad experiences with TEROs?

Mr. DANKS. I've had one real bad experience, and a couple that started out bad, but we worked out an amicable solution, and it turned out to be OK.

Senator MCCAIN. In your view, then, TEROs should be given increased responsibility for certification?

Mr. DANKS. I don't know if I'm ready at this point to say that.

I think that they definitely are a legitimate part of the process, and I think that they're very important to be involved in that process. But whether or not they're the sole responsibility—I'm not sure that I'm willing, at this point, to do that.

Although I understand for most part—you know, the TERO organizations are reservation based. I don't understand that, I know it.

They have a fairly good handle on who's legitimate and who isn't, and I believe they should be brought into the process.

Senator MCCAIN. I see.

Thank you very much.

Thank you, Mr. Chairman.

Senator DECONCINI. Mr. Danks, thank you for your testimony. You've given us a very precise picture of legitimate contracting and some of the problems that you've faced on the reservation, and we thank you for being with us today. You've been very helpful.

We thank you also for the time that you've spent, and the information that you've given to the staff of the committee, over the past several months of the investigation by this committee.

Mr. DANKS. Thank you very much, and good luck on your efforts. Hopefully, we'll see something.

Senator DECONCINI. We are now going to ask Special Agent Richard James Elroy to start his testimony.

It wasn't scheduled until 2 p.m., but we have a little time, and we're going to begin now.

Mr. Elroy has been employed as a Special Agent for the Federal Bureau of Investigation for the past 18 years. He's been assigned geographically to the State of Oklahoma for most of his career. In the course of his normal duties, he has investigated numerous matters within the Indian trust lands.

He has worked with the special committee for the past 6 months, assisting them in their investigation.

Mr. Elroy, thank you for the fine work you've done.

[Witness sworn.]

STATEMENT OF RICHARD JAMES ELROY, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION

Senator DECONCINI. Counsel Sollers.

Mr. SOLLERS. Thank you, Mr. Chairman.

Please state your full name for the record.

Mr. Elroy. Richard James Elroy.

Mr. Sollers. How are you employed, sir?

Mr. Elroy. I'm a special agent employed by the U.S. Department of Justice, Federal Bureau of Investigation, assigned to the Oklahoma State Division.

Mr. Sollers. Does that Oklahoma State Division have jurisdiction over matters in Indian Country?

Mr. Elroy. Yes, sir; it does.

Mr. Sollers. How long have you been with the FBI?

Mr. Elroy. For 18 years.

Mr. Sollers. You've been a special agent all those 18 years?

Mr. Elroy. Yes, sir.

Mr. Sollers. In the course of your career, have you investigated numerous criminal matters on Indian land?

Mr. Elroy. Yes, sir.

Mr. Sollers. Have you also conducted investigations on behalf of this committee?

Mr. Elroy. Yes, I have.

Mr. Sollers. Now, Special Agent, is one of the allegations that you've been involved in investigating allegations of contractor fraud in Indian preference?

Mr. Elroy. Yes, sir.

Mr. Sollers. Generally what is Indian preference?

Mr. Elroy. Preferential treatment given to minority or Indian contractors in obtaining Government construction—usually—contracts.

Mr. Sollers. Now, what two general categories of allegations has this committee received and subsequently followed up on with regard to Indian contracting?

Mr. Elroy. Allegations of kickbacks, would be one area.

Mr. Sollers. That would be kickbacks to various contracting officials that may make a decision in the contracting process?

Mr. Elroy. That's correct.

Mr. Sollers. What would be the second category?

Mr. Elroy. That would be Indian strawmen or fronts.

Mr. Sollers. That would be a situation where an Indian is set up by a non-Indian company to help qualify under Indian preference? Is that right?

Mr. Elroy. Yes.

Mr. Sollers. Now, today, Special Agent, we've asked you to summarize some of the fronts that the committee has followed up on, is that correct?

Mr. Elroy. Yes.

Mr. Sollers. Now, what we'd like you to do is first provide a very brief overview of Indian preference in bidding contracts.

Other witnesses will more specifically address specific programs and individual program deficiencies.

Let me just first ask you, how did Indian preference come about?

Mr. Elroy. Congress enacted a very general statutory scheme which allows for preferential treatment to be accorded Indian-owned contracting firms on the awarding of Government-funded contracts on Indian lands.

Various Government agencies and tribal entities then promulgated their own regulations and guidelines at great variance.

Mr. SOLLERS. Based on your experience in Oklahoma, and also looking at the results of this investigation, has the enforcement by Government agencies been effective?

Mr. ELROY. No; it's been lax, at best.

Mr. SOLLERS. And what is the result, Special Agent, of the variance in guidelines issued by the various agencies in the Indian preference programs?

Mr. ELROY. I think that it, at best, creates a climate of confusion, and it's an environment for fraud and deception.

Mr. SOLLERS. Now, Special Agent, if you would, could you give a brief overview of the Indian Preference Program of the Bureau of Indian Affairs?

Mr. ELROY. Well, despite some requests by the committee to the Bureau of Indian Affairs for certain documents, they've been unable to provide exact estimates of contracts available in 1988 under Indian Preference.

One of our estimates, conservatively, is approximately $50 million.

The Buy Indian Act, 25 USC 47, is a statutory authority which allows the Bureau of Indian Affairs to let contracts under Indian preference.

Now, BIA has never finalized regulations on the implementation of Indian Preference in bidding under the Buy Indian Act. Currently, local BIA contracting officers have been directed by internal guidelines to restrict the bidding for an Indian Preference contract to only qualified Indian bidders.

If less than two qualified Indian firms are interested in bidding the contract, the contract can be bid by non-Indian firms as well.

Qualified Indian firms are defined by the Bureau of Indian Affairs as firms which are 51 percent Indian-owned. BIA, of course, allows for self-certification.

Mr. SOLLERS. Has that been a problem?

Mr. ELROY. Yes.

Mr. SOLLERS. Does the Indian Health Service, or the Department of Health and Human Services, also have an Indian Preference Program?

Mr. ELROY. Yes; they do.

Mr. SOLLERS. How many contracts, or what dollar amount?

Mr. ELROY. About $31 million.

Mr. SOLLERS. How about HUD? Did they have an Indian preference program?

Mr. ELROY. Yes; they do.

Mr. SOLLERS. What amount of contracts were available under HUD's Indian preference program in 1988?

Mr. ELROY. About $148 million.

Mr. SOLLERS. Could you give just a quick, thumbnail sketch of HUD's Indian preference program?

Mr. ELROY. I think that they have six regional Offices of Indian Programs, which distribute funds to local Indian housing authorities, called IHAs, Indian Housing Authorities.

The IHAs are usually a quasi-Governmental corporation, the exception probably being the State of Oklahoma, where they are really an arm of the State.

Most of them are quasi-Governmental corporations which are responsible for putting contracts out for bid, making awards on such contracts, and administering the contracts.

IHAs are responsible for ensuring that the Indian firm bidding under Indian Preference is a qualified Indian firm. HUD requires that the qualified Indian firm be at least 51 percent Indian owned.

The IHAs require contractors to submit certifications that they're preforming the contract—that they're the performing contractor.

Sometimes in joint ventures with non-Indian firms, it's only necessary that the Indian be 51 percent owner of the corporation.

Mr. SOLLERS. Do these individual Indian Housing Authorities across the country have a great deal of autonomy in the contracting process?

Mr. ELROY. Yes; they do.

Mr. SOLLERS. Now, Special Agent, are there also contracts administered by the tribes themselves under Indian Preference?

Mr. ELROY. Yes.

Mr. SOLLERS. Is that pursuant to Public Law 93-638?

Mr. ELROY. That's correct.

Mr. SOLLERS. Does that law provide a lump sum of funds to tribes, which they will contract themselves?

Mr. ELROY. Yes.

Mr. SOLLERS. Do the tribes have their own Indian preference programs, many of them?

Mr. ELROY. Yes; they do.

Mr. SOLLERS. Do they vary greatly?

Mr. ELROY. Greatly.

Mr. SOLLERS. Are hundreds of millions of dollars distributed to the various tribes under Public Law 93-638 each year?

Mr. ELROY. Yes.

Mr. SOLLERS. Now, Special Agent, the committee has discovered numerous fronting relationships across the country—is that correct?

Mr. ELROY. That's correct.

Mr. SOLLERS. Over the next couple of days, this committee will present testimony of the actual participants in some of those relationships.

You have been asked to summarize some others. Now, do they vary greatly in the way they are set up?

Mr. ELROY. Yes; they do.

Mr. SOLLERS. What would be the most blatant form of a front?

Mr. ELROY. It would be a storefront operation, where an Indian is asked to form a corporation which is just a shell corporation and has no assets, no equipment, no employees.

He receives on paper 51 percent or 100 percent of the profits. There are just no profits. The money is siphoned off by the parent corporation, so that the minority is left with sometimes gas money, other times a small salary.

Mr. SOLLERS. Now, there is a whole continuum of these types of relationships, is that right?

Mr. ELROY. Yes.

Mr. SOLLERS. They would range to—what other types of relationships?

Mr. ELROY. The other end of the spectrum would be a situation where the minority contractor is actually performing all the work, and in most senses of the word, performing as a decisionmaker.

But he has to pay a premium to the parent company for the ability to bond, and using the assets of the parent company in order to obtain bonding, which puts him completely at the mercy of the parent company. Exorbitant fees are extracted from him under those circumstances.

Mr. SOLLERS. Now, are many of the agreements between what we'll call front and back companies under Indian Preference silent or side agreements?

Mr. ELROY. I don't know of any that aren't.

Mr. SOLLERS. Is it the case that there will be a joint venture agreement stating terms of X and Y, and nowhere in the joint venture agreement will there appear the true terms of the financial relationship between the front and the back?

Mr. ELROY. That's absolutely correct.

Mr. SOLLERS. Now, Special Agent, I'm going to ask you to summarize a number of the fronting relationships that the committee has uncovered.

Is it the case that some of this information was obtained pursuant to immunity orders obtained from the United States District Court?

Mr. ELROY. Yes, sir; that's correct.

Mr. SOLLERS. Let me first direct your attention to a relationship which spanned the years 1981 through 1987. It involved R&S Construction and Early American Contracting, Inc., and that was in Rapid City, SD.

What did the committee learn about this relationship?

Mr. ELROY. From 1981 to 1987, R&S Construction used a front, Early American Contracting, Inc., to bid construction contracts under Indian preference laws.

The companies, both based on the same offices, in Rapid City, SD, completed a number of Indian set-aside projects, including new Indian housing units.

Early American Contracting was owned by Albert Long, an enrolled member of the Rosebud Sioux Tribe in South Dakota. Early American had no equipment of its own, and the relationship with R&S was formed in April 1981, pursuant to a "job proctor" agreement.

It called for R&S to provide the following services for Early American: Bonding, accounting records and field consultation services.

In return, R&S would receive a fee of 5.1 percent of gross receipts on each contract.

This money came off the top, regardless of whether money was lost on the project. In addition, R&S received 49 percent of the net profits on each contract.

R&S also had majority control of Early American's board of directors. R&S always sent one of its employees to the job sites as superintendent on Early American projects.

This person was put on Early American's payroll. R&S, at substantial profit, also provided all the lumber to Early American for its jobs.

The financial arrangement was to the detriment of the Indian company, Early American.

As an example on one project, Early American reported a $115,000 net loss on the project. R&S, on the other hand, obtained approximately $255,000 on the same project from its 5.1 percent proctor fee, taken from the gross receipts, plus its profit on the lumber.

Mr. SOLLERS. So in that instance, on that project, the Indian firm lost $115,000, while the backer made $255,000 on the same project—is that right?

Mr. ELROY. That's exactly right, and it's typical of all of these relationships.

Mr. SOLLERS. What is Mr. Long stating about the character of this relationship, and whether or not it helped him?

Mr. ELROY. Typically—or the typical situation is that the only person who really benefits here is the parent company, the non-Indian company.

This doesn't help the Indian-owned company to develop bondability, it doesn't really give him any experience, in most instances. He usually comes out financially, and in other ways, at a loss.

Mr. SOLLERS. Was Mr. Long forced to abandon his company after R&S terminated its relationship with them?

Mr. ELROY. Yes.

Mr. SOLLERS. Let me direct your attention to another relationship, ongoing, between JWJ Contracting and Ed Waln, W-A-L-N, Construction, Inc., in Phoenix, AZ.

What did the committee determine about that relationship?

Mr. ELROY. Since August, 1985, JWJ, a non-Indian owned company in Phoenix, AZ, has had a relationship with Ed Waln Construction, Inc., which was 100 percent owned by Ed Waln, a member of the Rosebud Sioux Tribe—since their alignment in 1985, Waln and JWJ have completed 32 contracts, including Indian housing contracts, BIA contracts, Indian Health Service contracts.

The primary purpose of the relationship is to enable Waln to obtain bonding for its Indian projects. In return for backing Waln, JWJ receives a staggering 65 percent of the net profits of each project.

E.J. Johnson, president, and part owner of JWJ Contracting, Inc., has acknowledged that JWJ receives 65 percent of Waln's profits simply to assist Waln in obtaining bonding and to fund a portion of the salary of Lon McDermott, a Waln employee.

McDermott formerly was employed by JWJ, and is in effect the ongoing JWJ presence at Ed Waln Construction.

Mr. SOLLERS. Has the committee looked into another relationship in Arizona between AZCON Construction Company and Calvin Construction?

Mr. ELROY. Yes.

Mr. SOLLERS. What has it found?

Mr. ELROY. In December 1987, AZCON Construction Company, a non-Indian owned company, entered into a joint venture agreement with the Calvin Corporation, which is owned 100 percent by Stephen Calvin, an Indian.

Calvin joint-ventures with different brokers, and pursues a strategy of owning no equipment and subcontracting 100 percent of the Indian preference work obtained by the company.

With regard to one joint venture project performed thus far by AZCON, Calvin received a salary of $500 a week. This salary was to be deducted from the 51 percent 49 percent split of the profits at the end of the project.

The question here is whether an Indian-owned—whether this serves the Indian company when we appear here to just have a salaried employee—that's what he is, he's a salaried employee.

His only purpose is, of course, to obtain the Indian preference work.

Mr. SOLLERS. I take it the salaried native American is really acting as a broker, obtaining the Indian preference projects for the non-Indian company; is that right?

Mr. ELROY. That's correct.

Mr. SOLLERS. The committee also looked into an association between M. Greenberg Construction and Guy Gorman in Arizona?

Mr. ELROY. That's correct.

Mr. SOLLERS. What do we find there?

Mr. ELROY. In 1983, M. Greenberg Construction entered into an agreement with Guy Gorman to qualify for contracts under Indian preference.

A corporation was formed—Gorman Greenberg, Inc., to bid on any Indian preference contracts.

Under the consulting and services agreement, Greenberg Construction was to receive 60 percent of the net profit from each job completed by the new entity.

Besides this 60 percent cut taken by Greenberg Construction, a 7-percent overhead reimbursement fee was charged on every project performed. Furthermore, M. Greenberg received a 2-percent net management fee.

In addition, the joint venture agreement stated that Guy Gorman, the Indian, could not bid the joint venture contractually without the prior approval of Greenberg.

Initially setting up the company, Gorman was required to purchase 50 percent of the shares of the company for $12,750. Those funds were loaned to Gorman by Greenberg Construction, pursuant to a 3-year promissory note.

This joint venture submitted certifications to HUD and Indian Housing Authority certifying that the percent of the ownership 51 percent Guy Gorman and 49 percent Greenberg Construction.

In reality, the joint venture agreement substantially skewed that profit split. Indeed, at least one housing authority raised questions about the integrity of the relationship and the profit split.

The joint venture completed both HUD and IRS contracts, and Gorman ended the relationship for financial and emotional reasons.

Mr. SOLLERS. Thank you, Special Agent.

Mr. Chairman, I think this might be a good time to break.

Senator DECONCINI. Special Agent Elroy, thank you very much.

The committee is going to take a break now. We will return with Mr. Elroy, and finish up with his report. We'll move along a little faster on that, a little more of a summary nature, so that we can get to some of the other witnesses.

Thank you, Mr. Elroy.

The committee will stand in recess until 2 p.m. this afternoon.

[Whereupon, at 11:55 a.m., the special committee was adjourned, to reconvene at 2 p.m., this same day.]

AFTERNOON SESSION—2 P.M.

Senator **DeConcini**. The Special Committee on Investigations will come to order.

Senator McCain is on his way. He is downtown and detained, but he will be here shortly. We will proceed with Mr. Elroy to continue his testimony.

Mr. Sollers.

Mr. **Sollers**. Thank you, Mr. Chairman.

You are still under oath.

Special Agent, when we left off we were discussing a number of front/back relationships that the special committee has investigated; is that correct?

Mr. **Elroy**. Yes.

Mr. **Sollers**. And we will seek to streamline this a little bit and move it along.

Did the committee investigate a relationship between Morrison-Knudsen and Chuska Development?

Mr. **Elroy**. Yes.

Mr. **Sollers**. And is Morrison-Knudsen one of the largest contracting firms in the United States?

Mr. **Elroy**. Yes; it is.

Mr. **Sollers**. Did we obtain information concerning the alleged profit split that was to take place between Morrison-Knudsen and Chuska?

Mr. **Elroy**. Yes; we did.

Mr. **Sollers**. What was the stated profit split on the joint venture agreement?

Mr. **Elroy**. It was a typical 51/49 split, with 51 going to the minority contractor.

Mr. **Sollers**. Now, Chuska Development was owned by whom, or is still owned by whom?

Mr. **Elroy**. That's the minority contractor.

Mr. **Sollers**. That is a Larry Manuelito?

Mr. **Elroy**. That's right.

Mr. **Sollers**. He's a well-known Navajo?

Mr. **Elroy**. Yes; he is.

Mr. **Sollers**. Now, in reality what was the profit split between Morrison-Knudsen and Chuska Development on the projects that they completed?

Mr. **Elroy**. There was a typical side agreement here where Morrison-Knudsen took 5 percent fee off the gross profits for management and bonding services, and then they took an additional 4 percent off the gross contract for design and architectural services.

Mr. **Sollers**. That provided Morrison-Knudsen with a substantial amount of leeway in taking money right off the top; is that correct?

Mr. **Elroy**. That's right.

Mr. SOLLERS. Now, was Larry Manuelito in effect, in this relationship, a broker for Indian preference contracts?

Mr. ELROY. Yes; he was.

Mr. SOLLERS. Did Chuska Development, owned by Larry Manuelito, have any equipment of its own or any other employees?

Mr. ELROY. No, he didn't. He had no equipment, no employees. He would be simply a means by which minority contracts were obtained by the non-minority parent company.

Mr. SOLLERS. Now, let me direct your attention to another relationship which employed Southwest Indian Construction, Inc., as a front. Does that, in fact, involve three different companies that are prepared to back Southwest Indian Construction?

Mr. ELROY. Yes.

Mr. SOLLERS. Are these relationships in Arizona?

Mr. ELROY. Yes.

Mr. SOLLERS. Now, what are the backing companies under the relationship to obtain from this front company?

Mr. ELROY. What did the backing companies obtain?

Mr. SOLLERS. Correct.

Mr. ELROY. Of course they obtained the majority of the profits, as in every other situation we have explored.

Mr. SOLLERS. Were the backing companies also to receive all the work basically on the jobs obtained by the Indian front?

Mr. ELROY. Yes; that's correct.

Mr. SOLLERS. What agreement did the backing companies have with the front?

Mr. ELROY. All the front got was an office and some gas money.

Mr. SOLLERS. The backing companies are named Wheeler Construction, Inc.——

Mr. ELROY. That's right.

Mr. SOLLERS. [continuing]. And Southwest Specialty Company; is that correct?

Mr. ELROY. That's correct.

Mr. SOLLERS. And there is another company called CS Construction, Inc., as well?

Mr. ELROY. Yes.

Mr. SOLLERS. Is this typical of the relationships that you have seen springing up across the country to take advantage of Indian preference contracts?

Mr. ELROY. Yes; it is.

Mr. SOLLERS. Let me direct your attention to yet another relationship which involves a front named Amarok Corporation, which used two different backers—Proswood Development, Inc., and Staker Paving Construction Company. First I'd ask you where Amarok is located.

Mr. ELROY. Salt Lake City.

Mr. SOLLERS. Staker Paving was a backer to Amarok on what type of projects?

Mr. ELROY. Staker Paving backed Indian road projects.

Mr. SOLLERS. How about Proswood Development?

Mr. ELROY. He was a backer on ten HUD projects.

Mr. SOLLERS. Now, with regard to Amarok and Staker, that particular relationship, did Amarok obtain a split of the profits for jobs done by those two?

Mr. Elroy. In this case some of the contracts provided for a straight fee.

Mr. Sollers. And that fee would be in lieu of an actual profit split?

Mr. Elroy. Yes.

Mr. Sollers. What did the joint venture agreement call for in terms of a profit split?

Mr. Elroy. It called for the typical 51 percent profit split, but that isn't what happened here.

Mr. Sollers. Now, with regard to Amarok and Proswood what was the agreement?

Mr. Elroy. There was a silent side agreement in which the parent company had provisions for consulting fees which significantly altered the profit split.

Mr. Sollers. Now, was this silent agreement called a consulting agreement?

Mr. Elroy. Yes.

Mr. Sollers. Is this also a common tool that is used between these front and back?

Mr. Elroy. Yes; it is.

Mr. Sollers. Let me ask you to speak about Hunt Building Corporation, which has used at various times three different Indian fronts. Where is Hunt located?

Mr. Elroy. In El Paso, TX.

Mr. Sollers. Describe, if you would, the three different relationships entered into by Hunt Building Corporations.

Mr. Elroy. Well, there was K Industries, which was one of the fronts. It had no books or records, and all the bookkeeping was handled right out of Hunt's office.

There was Vemold Livingston, which was an individual Indian front. All the controls over the work and funds belonged to the backer, which was Hunt.

And finally there was DJB Enterprises. Hunt received seven percent of the gross contract price as a management fee, while the front, DJB, received one half of one percent. The rest of the profit split was highly discretionary and completely controlled by Hunt.

Mr. Sollers. Now, Special Agent Elroy, has the committee obtained a substantial amount of information from various surety companies that bonded these relationships?

Mr. Elroy. Yes.

Mr. Sollers. That was pursuant to what?

Mr. Elroy. Pursuant to Congressional subpoenas.

Mr. Sollers. I'd ask you to read just one quote from an internal company memorandum—a surety company memorandum—which, in fact, describes the relationship between Hunt, the backer, and DJB, the front that you have just described.

Mr. Elroy. I'm quoting from this internal memorandum:

> Basically these joint ventures come about to provide the required Indian preference for Indian housing projects. You will note that the joint venture agreement for the bond indicates that Hunt will handle all the joint venture financial resources in management and set up a mutually agreeable fee for the use of its working capital, bonding capacity, et cetera.
>
> In this way they have a 51 percent minority-owned joint venture, but all of the control of the jobs, subcontractors, and financial resources are remaining with Hunt's organization.

This particular joint venture is involved with another party, 51 percent Indian-owned, who has minimal contracting skills; however, he does have adequate background and experience to pass the scrutiny of the Zuni Tribe Housing Authority.

Mr. SOLLERS. So I take it, based on this quote, one consideration was whether or not the front would be able to slip by the scrutiny of an Indian housing authority; is that correct?

Mr. ELROY. That's correct.

Mr. SOLLERS. Now, finally, Special Agent Elroy, I'd ask you to discuss the findings of the committee with regard to Evcor and Indian Construction Services, a relationship that occurs in Phoenix, AZ. Did we discover, with regard to this relationship, yet another hidden agreement?

Mr. ELROY. Yes.

Mr. SOLLERS. What was the effect of the hidden agreement which altered the terms of the public joint venture agreement?

Mr. ELROY. Well, it significantly changed the profit split allowed to Evcor. It was loaded up with administrative costs, allocated substantial overhead, provided for compensation to key Evcor employees, and a provision for other charges, which left the parent company in control.

Mr. SOLLERS. What's the bottom-line effect of these provisions of this silent agreement?

Mr. ELROY. It allowed Evcor to control and reduce the profits.

Mr. SOLLERS. Was this hidden agreement ever submitted to federal agencies or to the various tribes?

Mr. ELROY. Absolutely not.

Mr. SOLLERS. What would an oversight agency or a tribal entity believe if it reviewed the actual joint venture agreement?

Mr. ELROY. If they just looked at a joint venture agreement they would believe that it was a legitimate 51/49 split.

Mr. SOLLERS. With the 51 percent profits to go to the front, Indian Construction Services; is that correct?

Mr. ELROY. That's correct.

Mr. SOLLERS. But, indeed, that was not the case; is that also correct?

Mr. ELROY. That's correct.

Mr. SOLLERS. Now, Special Agent, is it the case that this is but a few series of examples of the relationships that are out there across the country?

Mr. ELROY. Yes; it is.

Mr. SOLLERS. And I take it if we had more time and more resources we could go on with the presentation of these relationships for a long time; is that correct?

Mr. ELROY. That is correct.

Mr. SOLLERS. And is it your opinion, based on your experience in Indian Country, as well as your investigation of this matter, that the problem of Indian fronting on the reservation is a pervasive one?

Mr. ELROY. Yes; it is.

Mr. SOLLERS. One final question, Special Agent: why are these relationships not prosecuted?

Mr. ELROY. In most of the cases the participants certainly violate the intent of the Indian preference laws, but they don't always violate the letter of the law. If there is going to be any real enforcement you have to give the Justice Department something to enforce. So you need a detailed affidavit that spells out these relationships that all the participants sign and swear to. That hasn't been done.

Mr. **Sollers**. I take it that the current certification process is relatively vague?

Mr. **Elroy**. It is vague, and it is not consistent. Rarely do they cover all the bases like, of course, the prosecutor would like so he has something to proceed with.

Mr. **Sollers**. Mr. Chairman, that concludes my questions.

Senator **DeConcini**. Thank you, counsel.

Agent Elroy, I want to thank you for the outstanding work you have done and accomplished for the committee while you have been with us. We appreciate it, and we have more for you to do, as you know. It has been very good.

I do want to ask you this: in the conduct of this investigation for the committee, you reviewed certain things—subpoenas, I presume?

Mr. **Elroy**. Utilized certain things?

Senator **DeConcini**. Utilized and reviewed certain things and documents.

Mr. **Elroy**. Yes.

Senator **DeConcini**. One was subpoenas that the committee had issued?

Mr. **Elroy**. Yes, sir.

Senator **DeConcini**. Documents that were either subpoenaed or voluntarily given to the committee?

Mr. **Elroy**. Yes, sir.

Senator **DeConcini**. And you conducted interviews and participated in depositions; is that correct?

Mr. **Elroy**. Yes, sir.

Senator **DeConcini**. All pursuant to the immunity that was granted to some of the witnesses that we're going to call shortly? Or partly? Those that were granted immunity, did you participate in those investigations?

Mr. **Elroy**. Yes, sir.

Senator **DeConcini**. And you talk about the reason no prosecution—counsel asked the question, "To conduct an investigation like this, from your past experience—not these particular cases—it takes a great deal of resources and time?"

Mr. **Elroy**. Yes, sir; it sure does.

Senator **DeConcini**. And have you done those kind of investigations before?

Mr. **Elroy**. Yes, sir.

Senator **DeConcini**. Can you give us just a rough idea of how many you have been involved in with your career in dealing with Indian contracting or Indian contracts or anything related thereto?

Mr. **Elroy**. Hundreds.

Senator **DeConcini**. Hundreds. Thank you.

Thank you very much, Agent Elroy. We appreciate your testimony.

We will now proceed with some immunized witnesses. Our first witnesses are going to be Gevene Savala and David Savala, who will not be here. Although he had agreed to attend, his attorney will be here and read a statement. We will also hear from Mr. Louis Day. Will those three individuals please come forward?

[Witnesses sworn.]

Senator DECONCINI. We are going to wait just a few minutes for Senator McCain before we proceed.

[Recess.]

Senator DECONCINI. Senator McCain has telephoned and is on his way. Because of the schedule here we are going to proceed.

We are glad to have Senator Daschle with us. Do you have any statements?

Senator DASCHLE. I don't.

Senator DECONCINI. We're very pleased to have you here.

At this time I want to thank the witnesses for being here. We're going to go through the procedure of the immunization. Questions will begin with the counsel, Mr. Brandolino.

STATEMENT OF DAVID AND GEVENE SAVALA

Mr. BRANDOLINO. Thank you, Mr. Chairman.

Mr. Bartolomei, you are an attorney representing David Savala, Gevene Savala, and Louis Day in this proceeding; is that correct?

Mr. BARTOLOMEI. That's correct.

Mr. BRANDOLINO. I understand David Savala has, instead of appearing today, submitted an affidavit?

Mr. BARTOLOMEI. That's true.

Mr. BRANDOLINO. He would have been available but had decided to submit an affidavit; is that correct?

Mr. BARTOLOMEI. That's correct.

Mr. BRANDOLINO. Mr. Bartolomei, I will formally pose for the record a question directed toward David Savala and Gevene Savala. What has been the relationship between Savala Asphalt and Construction Enterprises, Inc., and Arizona Refining?

Mr. BARTOLOMEI. Mr. Brandolino, on behalf of my clients, Gevene Savala and David Savala, they respectfully exercise their rights under the Fifth Amendment and they choose not to answer that question.

Mr. BRANDOLINO. Mr. Chairman, David Savala and Gevene Savala have refused to answer a question posed to them by the committee. I request that the chairman of the special committee communicate immunity as it is obtained for Gevene Savala and David Savala.

Senator DECONCINI. Thank you, counsel.

I am hereby communicating to you two orders issued by the U.S. District Court for the District of Columbia directed toward your clients, David Savala and Gevene Savala. The orders provide, in substance, that your clients may not refuse to provide evidence to the special committee on the basis of their privilege against self-incrimination. It provides that evidence obtained from your clients under these orders may not be used against them in any criminal proceedings. A copy of the orders are at the witness table and, without objection, will be placed in the record at this time.

[Orders issued by the U.S. District Court for the District of Columbia directed toward David Savala and Gevene Savala follow:]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 12 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 88-0315

ORDER

Upon consideration of the application by the Senate Select Committee on Indian Affairs, and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 12th day of October, 1988,

ORDERED That David Savala may not refuse to testify, and provide other information, at proceedings of the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against David Savala in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

Aubrey E. Robinson Jr.
Chief Judge

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By Linda L. Romero
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
DEC 19 1988
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 88-408

ORDER

Upon consideration of the application by the Senate Select Committee on Indian Affairs, and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 16th day of December, 1988,

ORDERED That Gevene E. Savala may not refuse to testify, and provide other information, at proceedings of the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, on the basis of her privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against Gevene E. Savala in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

Aubrey E. Robinson Jr.
Chief Judge

United States District Court
For the District of Columbia
A TRUE COPY

JAMES F. DAVEY, Clerk
By Linda L. Powers
Deputy Clerk

Senator DeConcini. Pursuant to these orders, I direct your clients to answer the questions put to them.

Mr. Bartolomei, the immunity procedure now is complete, and Mr. Brandolino will resume the questioning.

Mr. Bartolomei. Thank you.

Mr. Brandolino. Thank you, Mr. Chairman.

Mr. Bartolomei, do you wish to read a statement on behalf of David Savala?

Mr. Bartolomei. Yes, I do.

Mr. Brandolino. Could you read that please?

Mr. Bartolomei.

I, David Savala, do hereby swear that the following facts represented by me before the Special Committee on Investigations of the United States Senate are true to the best of my knowledge.

I am currently vice president of Savala Asphalt and Construction Enterprises, Inc., an Arizona corporation, and a director of the company.

I am married to Gevene Savala, who is president of the company and one of its directors. Gevene owns 100 percent of the company's stock. I am a Mexican American, and my wife is a Native American Indian and a member of the Kaibab Paiute tribe. We have two children, Angelina and Manuel, who currently work full time for our company.

From 1974 to 1980 I was a member of Local 104 and drove a spreader truck for the Arizona Refining Company. Arizona Refining was involved in the sale of petroleum and asphalt products to contractors who would use them in the construction of roads. On various occasions Arizona Refining was also responsible for applying the products at the construction sites as a subcontractor.

Some time in 1980 James Bagley, then president of Arizona Refining, approached me with his suggestion that I create my own business in order to take advantage of minority set-aside contracts. Mr. Bagley's plan called for my wife to be the 100 percent owner of the business so that we would qualify for contract set-aside by the Bureau of Indian Affairs.

Prior to this time, I had no intentions of starting my own company, nor did I have the means to do so. However, Mr. Bagley guaranteed that if I created my own business my income would at least double, and promised that I would not incur any losses.

Mr. Bagley suggested that I take a leave of absence from the union, and that if the business did not work out after a year I could return to Arizona Refining as a driver and keep my seniority with the union.

I initially did not want to start a business, but Mr. Bagley persisted, and based on his promises, I agreed.

In the beginning years of the company—which, at the time, was a sole proprietorship—I began obtaining minority subcontracts from contractors who were building roads. Procedurally, Arizona Refining would prepare the forms necessary to bid such contracts on Savala Asphalt stationery. Arizona Refining would then either obtain my signature on the bid or, as was often the case, Arizona Refining would simply prepare the bids on forms that I had pre-signed and submit them for approval. I never obtained quotes from other asphalt suppliers, nor did I review these bids.

As subcontracts were awarded to my company, Mr. Bagley or other Arizona Refining representatives would contact me and tell me when and where I needed to show up to perform those duties. Savala Asphalt would then purchase petroleum products from Arizona Refining, and I would appear on site to do exactly what I had been doing as an employee of Arizona Refining—drive a truck and lay the petroleum products provided by Arizona Refining.

Substantially all petroleum products which we purchased and used to perform these contracts were purchased from Arizona Refining. It was understood between James Bagley and I that I would purchase these products from Arizona Refining. The petroleum products were sold by Arizona Refining to our business at an unusually high mark-up. The only times we purchased products elsewhere occurred when it was not profitable for Arizona Refining to provide them.

In 1983 my company began its involvement with 100 percent Indian set-aside contracts. At Mr. Bagley's suggestion, I incorporated Savala Asphalt and my wife became a 100 percent shareholder. Gevene has invested approximately $90,000 of her own money into our company.

Because she is a Native American, our company qualified for Indian set-aside contracts under the Bureau of Indian Affairs. The 100 percent set-aside contracts required bonding, which our company was unable to obtain. Accordingly, Arizona Refining agreed to guarantee our bonds. Of course, these guarantees were made with the understanding that our company would acquire products from Arizona Refining as a subcontractor on the contracts.

With bonding assistance from Arizona Refining and a construction company referred to me by Mr. Bagley my company began bidding and receiving million-dollar Indian road work and Indian housing projects. Within a few months time we began performing some general contractor work, and our business went from a company doing a volume of less than $1 million per year in contracts to a company performing over $10 million per year in contracts.

Around 1986 Arizona Refining was sold, and under the new ownership it discontinued bonding for our company. We were determined to keep the company operating, so I surveyed bonding companies to determine if any would provide me with bonding. I was unable to obtain bonding at the levels provided by Arizona Refining. As a result, the annual volume of contracts performed by my company dropped from over $10 million in 1985 to slightly over $1 million in 1986.

Today I am working proudly to see my company grow; however, I am still feeling the after effects of my relationship with Arizona Refining. It will be some time before my company is free from the financial burdens of its early years and its relationship with Arizona Refining.

Signed: David Savala.

Mr. BRANDOLINO. Thank you, Mr. Bartolomei. This is a sworn statement by David Savala?

Mr. BARTOLOMEI. Yes; it is.

Mr. BRANDOLINO. Thank you.

[Sworn statement of Mr. Savala follows:]

STATE OF ARIZONA)
) ss.
County of Maricopa)

AFFIDAVIT

I, David Savala, do hereby swear that the following facts represented by me before the Special Committee on Investigations of the United States Senate are true to the best of my knowledge:

I am currently Vice-President of Savala Asphalt and Construction Enterprises, Inc., an Arizona corporation, ("Company"), and a director of the Company. I am married to Gevene Savala who is President of the Company and one of its directors. Gevene owns 100% of the company's stock. I am a Mexican-American and my wife is a Native American Indian and a member of the Kaibab Paiute tribe. We have two children, Angelina and Manuel, who currently work fill-time for our company.

From 1974 to 1980, I was a member of Local 104 and drove a spreader truck for the Arizona Refining Company. Arizona Refining was involved in the sale of petroleum and asphalt products to contractors who would use them in the construction of roads. On various occasions, Arizona Refining was also responsible for applying the products at the construction sites, as a subcontractor.

Sometime in 1980, James Bagley, then President of Arizona Refining, approached me with his suggestion that I create my own business in order to take advantage of minority set-aside contracts. Mr. Bagley's plan called for my wife to be the 100% owner of the business so that we could qualify for contracts set-aside by the Bureau of Indian Affairs. Prior to this time, I had no intentions of starting my own company nor did I have the means to do so. However, Mr. Bagley guaranteed that if I created my own business, my income would at least double, and promised that I would not incur any losses. Mr. Bagley suggested that I take a leave of absence from the Union and that if the business did not work out after a year, I could return to Arizona Refining as a driver and keep my seniority with the Union. I initially did not want to start a business but Mr. Bagley persisted and, based on his promises, I agreed.

In the beginning years of the Company (which at the time was a sole proprietorship), I began obtaining minority subcontracts from contractors who were building roads. Procedurally, Arizona Refining would prepare the forms necessary to bid such contracts on Savala Asphalt stationary. Arizona Refining would then either obtain my signature on the bid, or, as was often the case, Arizona Refining would simply prepare the bids on forms that I had pre-signed, and submit them for approval. I never obtained quotes from other asphalt suppliers, nor did I review these bids.

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Substantially all petroleum products which we purchased and used to perform these contracts were purchased from Arizona Refining. It was understood between James Bagley and I that I would purchase these products from Arizona Refining. The petroleum products were sold by Arizona Refining to our business at an unusually high markup. The only times we purchased products elsewhere occurred when it was not profitable for Arizona Refining to provide them.

In 1983, my company began its involvement with 100% Indian set-aside contracts. At Mr. Bagley's suggestion, I incorporated Savala Asphalt and my wife became a 100% shareholder. Gevene has invested approximately $90,000.00 of her own money into our company. Because she is a Native American, our company qualified for Indian set-aside contracts under the Bureau of Indian Affairs.

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Today, I am working proudly to see my company grow. However, I am still feeling the aftereffects of my relationship with Arizona Refining. It will be some time before my company is free from the financial burdens of its early years and its relationship with Arizona Refining.

Further affiant saith naught.

David G Savala
David Savala

SUBSCRIBED AND SWORN to before me this 28th day of January, 1989, by David Savala.

Sheila M. Rochin
Notary Public

My Commission Expires:

OFFICIAL SEAL
SHEILA M. ROCHIN
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Nov. 20, 1992

Mrs. Savala, could you state your full name for the record?

Mrs. SAVALA. Mrs. Gevene Savala.

Mr. BRANDOLINO. Mrs. Savala, the affidavit just read by Mr. Bartolomei is the sworn statement of your husband, David Savala; is that correct?

Mrs. SAVALA. That's right.

Mr. BRANDOLINO. Mrs. Savala, are you the president and 100 percent shareholder of Savala Asphalt?

Mrs. SAVALA. Yes.

Mr. BRANDOLINO. Are you an American Indian, Mrs. Savala?

Mrs. SAVALA. Yes; I am.

Mr. BRANDOLINO. Are you an enrolled member of a federally-recognized tribe?

Mrs. SAVALA. Yes.

Mr. BRANDOLINO. What tribe is that?

Mrs. SAVALA. The Kaibab Paiute.

Mr. BRANDOLINO. Mrs. Savala, how long have you been the owner of Savala Asphalt?

Mrs. SAVALA. Since the beginning.

Mr. BRANDOLINO. And when did the company begin?

Mrs. SAVALA. December 1979.

Mr. BRANDOLINO. Before that time had you any experience in contracting or the construction industry?

Mrs. SAVALA. No.

Mr. BRANDOLINO. Could you state briefly your education or work experience prior to the time that Savala Asphalt was formed?

Mrs. SAVALA. From the year 1970 to the present time I had been attending college at night majoring in fine art and also at this time I took some business courses. I do not have a degree yet.

Mr. BRANDOLINO. How about your work experience?

Mrs. SAVALA. From the year 1969 to 1970 I worked for the Los Angeles County Hospital as a nursing attendant. From October 1970 I worked as a health supervisor for the CHR program on the Kaibab Paiute Indian Reservation. I held this position until 1982. In December 1979 David started his asphalt business. It was at this time that I started to do the paperwork for him.

Mr. BRANDOLINO. So you were, at the time Savala Asphalt was formed, working full time as a nurse's assistant; is that correct? As a doctor's assistant?

Mrs. SAVALA. Yes; I was working as a supervisor.

Mr. BRANDOLINO. Supervisor?

Mrs. SAVALA. Yes.

Mr. BRANDOLINO. And you worked full time until 1982; is that correct?

Mrs. SAVALA. Yes; I did.

Mr. BRANDOLINO. When Savala Asphalt was formed did you know that your husband was being assisted by Arizona Refining?

Mrs. SAVALA. No; I didn't.

Mr. BRANDOLINO. What were your duties for Savala Asphalt when the business was formed?

Mrs. SAVALA. I did the general bookkeeping.

Mr. BRANDOLINO. And what duties did bookkeeping consist of?

Mrs. SAVALA. I paid the taxes, sent out invoices and statements, submitted weekly abstract reports, paid bills, and did the banking.

Mr. Brandolino. At some point you stopped performing bookkeeping duties; is that correct?

Mrs. Savala. Yes; I did.

Mr. Brandolino. When was that?

Mrs. Savala. That was December 1982, since winter months the construction business is slow.

Mr. Brandolino. After that what were your duties for Savala Asphalt?

Mrs. Savala. I did menial, small, odd jobs for them.

Mr. Brandolino. What do you mean by odd jobs?

Mrs. Savala. Since they did have their own—they moved to Phoenix at this time, 1983, and set up business down there, and all the office help and everything was—they hired everybody else from Phoenix. So I had stayed behind in Fredonia, so all I did at this time was refer calls down to the Phoenix area and the correspondence.

Mr. Brandolino. You would relay the mail down to the new office; is that correct?

Mrs. Savala. Yes.

Mr. Brandolino. Were you ever involved at any time in the history of Savala Asphalt in the preparation of bids for the on-site construction work?

Mrs. Savala. No; I wasn't.

Mr. Brandolino. Mrs. Savala, at some point your company became involved as a general contractor on Indian set aside work; is that correct?

Mrs. Savala. Yes.

Mr. Brandolino. Your company started performing BIA road construction contracts and HUD Indian housing contracts; is that correct?

Mrs. Savala. That's correct.

Mr. Brandolino. Whose idea was it to pursue these contracts?

Mrs. Savala. That I do not know.

Mr. Brandolino. How well do you know Mr. James Bagley, the former president of Arizona Refining?

Mrs. Savala. I met Mr. Bagley at the yearly meetings that were held for the drivers. At this time they would get together and tell them about what they were going to do for that coming year. Those were the times that I met him.

Mr. Brandolino. So the extent of your relationship with Mr. Bagley had been meeting him in these yearly meetings which are social occasions; is that correct?

Mrs. Savala. Yes.

Mr. Brandolino. Did Mr. Bagley ever speak to you about starting a contracting business or about general business plans or contracting in general?

Mrs. Savala. No.

Mr. Brandolino. Your husband was a truck driver for Savala Asphalt prior to starting the business; is that correct?

Mrs. Savala. Yes; he was.

Mr. Brandolino. Then one day, he approached you and told you that he desired to start a business. How did that come about?

Mrs. **Savala**. Well, he just told me that he was starting a business and asked if I was able to help him with the paperwork, so I told him that I would.

Mr. **Brandolino**. Did you, at that time, invest some money in the initial creation of Savala Asphalt?

Mrs. **Savala**. Yes; I did.

Mr. **Brandolino**. How much money did you invest?

Mrs. **Savala**. I invested $5,000 from my savings and some small inheritance that I had.

Mr. **Brandolino**. Since then have you continued to invest money into the business?

Mrs. **Savala**. I did around April to pay for Federal and State taxes to keep the company going.

Mr. **Brandolino**. So every year at about tax time your company had some cash flow problems and you would put money into it; is that correct?

Mrs. **Savala**. Yes.

Mr. **Brandolino**. How much money do you estimate you have invested in the business over the years?

Mrs. **Savala**. That I'm not sure of, but——

Mr. **Brandolino**. OK. Mrs. Savala, are you still owner and 100 percent shareholder of the company?

Mrs. **Savala**. I am.

Mr. **Brandolino**. Thank you.

STATEMENT OF CHARLES DAY, III, CONTROLLER, SAVALA ASPHALT

Mr. Day, will you please state your full name for the record?

Mr. **Day**. Louis Charles Day, III.

Mr. **Brandolino**. Mr. Day, are you currently the controller of Savala Asphalt?

Mr. **Day**. Yes; I am.

Mr. **Brandolino**. And how long have you held this position?

Mr. **Day**. Since October 1987.

Mr. **Brandolino**. What has been your education or work experience prior to joining Savala Asphalt in 1987?

Mr. **Day**. My educational experience: from 1961 to 1965 in electrical engineering. I graduated in 1983 with a bachelor of science in business administration, majoring in accounting, with minors in economics and mathematics. In 1987 I graduated from the University of Phoenix with a master's degree in business administration.

My work experience: the last 10 to 12 years I have been in a financial accounting position with emphasis in management. The positions have gone from a controller, which I presently am, to back in 1978 when I had my own business of which I was president.

Mr. **Brandolino**. Your experience has been as a controller for construction businesses, as well as an owner?

Mr. **Day**. Yes, sir; in fact, my experience in construction spans back over 25 years.

Mr. **Brandolino**. Since joining Savala Asphalt in 1987 have you had occasion to review the records of Savala Asphalt?

Mr. **Day**. Yes; I have.

Mr. **Brandolino**. Have you been able to review records that relate to its business prior to 1987 when you joined the company?

Mr. **Day**. Yes; I have.

Mr. **Brandolino**. From viewing these records, Mr. Day, and from your discussions with Mr. Savala, do you think there have been some aspects of the relationship between Savala Asphalt and Arizona Refining which have affected Savala Asphalt's viability as an independent business?

Mr. **Day**. Yes; as a matter of fact, there are a number of areas that I thought were very detrimental, but there are four areas which I'll name: No. 1, is the unusually rapid growth; No. 2, low gross margins; No. 3, unusually high mark-ups and No. 4, the effects of gross construction revenues dramatically dropped when Arizona Refining Company stopped guaranteeing bonds on Savala's desires to bid on BIA projects.

Mr. **Brandolino**. Let's go over those one at a time. The first one you mentioned was an unusual increase in volume. Could you explain that?

Mr. **Day**. Yes; there was an incredible increase in contract revenues which definitely exceeded the capabilities of Savala Asphalt handling these business affairs as an independent company.

Mr. **Brandolino**. In what time period did this growth occur?

Mr. **Day**. The period basically started from mid to late 1983 to the end of 1985. The business grew from contract revenues of approximately $800,000 in 1983 to more than $10 million in 1985. This was over a twelve-fold increase in just over 2 years. This could not have been even feasible without Arizona Refining guaranteeing the bonds on Savala Asphalt's BIA projects.

Mr. **Brandolino**. How did this growth adversely affect Savala Asphalt?

Mr. **Day**. Well, it had a great effect on them because, first of all, they didn't have the staff. They weren't financially capable. They didn't have any organizational structure. They did not have the key personnel or the construction expertise to carry on day-to-day operation.

Mr. **Brandolino**. Do you have an opinion on the motive of Arizona Refining, which was backing Savala Asphalt, to see the volume of Savala Asphalt's contracts grow so quickly?

Mr. **Day**. Yes; one of the main areas is the fact that, here again, in this period of time in 1983 this was when the BIA really kicked off in the Phoenix area and all areas the Indian preference contracts. They saw a brand new, big market for their oil products and asphalt products, and the more products that they could help Savala Asphalt obtain, it just made sense that the more asphalt products they would sell.

Mr. **Brandolino**. The second area that you mentioned which may have adversely affected the development of Savala Asphalt was the low gross profit margins of the asphalt products. Could you explain a little bit about that?

Mr. **Day**. Yes; the low gross profit margins—first let's try to understand what gross margins are. In this particular case, I'm going to define gross margins as the price that Savala Asphalt got paid or billed the BIA less the cost that Savala Asphalt paid to Arizona Refining.

Here are some examples: Savala Asphalt would bill the BIA $196 per ton for an asphalt product and would pay Arizona Refining Company $194 per ton. That left Savala Asphalt with $2 per ton gross margin, which is approximately 1 percent.

If you sold 1,000 tons, it would be $196,000, which meant that approximately $2,000 would to go Savala Asphalt and $194,000 would go to Arizona Refining.

But in the industry at this particular time the average was approximately 12 to 15 percent norm.

Mr. BRANDOLINO. Who set the prices at Savala Asphalt?

Mr. DAY. Arizona Refining Company.

Mr. BRANDOLINO. Did they set the price that Savala Asphalt paid for the asphalt when they purchased it from Arizona Refining?

Mr. DAY. Yes; they did.

Mr. BRANDOLINO. Did they also set the price that Savala Asphalt would charge for the asphalt when it, in turn, sold the asphalt to the federal agencies?

Mr. DAY. Yes; they did.

Mr. BRANDOLINO. How do you know that Arizona Refining charged these prices?

Mr. DAY. Well, reviewing documents, and I have also talked to Mr. David Savala about these because I could not believe what I was seeing. Here, again, what he told me was that he basically signed blank documents and they just filled them out and quoted him as such.

Mr. BRANDOLINO. So Arizona Refining prepared the bid forms, and these bid forms included in them the prices that they would charge for the asphalt when they performed the contracts, and then also the price that they would pay for it when they bought it from Arizona Refining?

Mr. DAY. Yes; they did.

Mr. BRANDOLINO. The third area that you mentioned was the high mark-up charge by Arizona Refining on these products. Could you explain that?

Mr. DAY. Here, again, the high mark-ups—and here, again, the thing you can draw from that is that Savala Asphalt was basically a retailer paying retailer prices rather than paying wholesale prices, which they should have been paying.

Mr. BRANDOLINO. The prices charged by Arizona Refining for the asphalt products that were sold to Savala Asphalt were unusually high and could have been obtained at a lower price on the market?

Mr. DAY. You're correct.

Mr. BRANDOLINO. Do you think that David Savala was free to purchase asphalt products from other businesses? Why didn't he go out into the open market?

Mr. DAY. I don't think he definitely was able to purchase from other companies. The price was set by Arizona Refining, which David had little choice but to pay due to the fact that they were providing bonding for the BIA projects, and if he would go elsewhere then they would just stop bonding him, which would leave him with nothing.

Mr. BRANDOLINO. And the fourth area that you mentioned which adversely affected the development of Savala Asphalt was the drastic drop in volume of their contracts. Could you explain a little bit about that?

Mr. DAY. Yes; here, again, in that same period in 1986, the volume in 1985 was better than $10 million. In 1986, it dropped down to a little over $1 million. This has a dramatic affect on an organization to survive. You start gearing up to start doing more business and all of the sudden you're down to one-tenth your size 1 year later.

Mr. BRANDOLINO. What was the reason for the drastic drop in volume?

Mr. DAY. Well, the basic reason was that Arizona Refining Company stopped bonding Savala Asphalt on BIA projects and they could not obtain their own bonding.

Mr. BRANDOLINO. Have there been other adverse effects of this drastic drop in volume of contracts?

Mr. DAY. Yes; there definitely have been a lot of adverse effects, and it takes—if you recall the affidavit read by Mr. Bartolomei, you pay for these things for a long time.

First of all, it was very difficult for a long period of time to obtain bonding. And another thing that they also have had to do is pay increased unemployment taxes. They are paying the higher rate than would be normal. And also they are paying higher rates for insurance premiums because, in any business, the more volume you do, to some extent your risk goes up, therefore you pay a higher premium for these types of things.

Mr. BRANDOLINO. As far as the unemployment taxes, they were paying a higher percentage of taxes because of the fact that they employed so many persons?

Mr. DAY. This is correct.

Mr. BRANDOLINO. They had to lay off a lot of people at the time that their volume of contracts dropped; is that correct?

Mr. DAY. This is absolutely correct.

Mr. BRANDOLINO. I understand that after Arizona Refining terminated its relationship with Savala Asphalt that Mr. Savala was determined to keep the business running, and the business is still operating today; is that correct?

Mr. DAY. Yes, it is.

Mr. BRANDOLINO. In your opinion, do you think that Mr. Savala is still paying for, or has he benefitted from his relationship with Arizona Refining?

Mr. DAY. He's still paying for it, and it will be years to come before he actually gets done paying for it.

Senator DECONCINI. Mr. Sollers.

Mr. SOLLERS. One question, Mr. Day. You have been testifying concerning the squeeze in the gross margins that Savala was able to charge. He was getting squeezed by Arizona Refining on the resources. Why didn't Mr. Savala just walk away from the deal?

Mr. DAY. What are you in reference to?

Mr. SOLLERS. In reference to his arrangement with Arizona Refining. Why didn't Mr. Savala just say he's had it with getting squeezed and just walk away from the deal?

Mr. DAY. Well, as I made mention, as far as I am concerned he had no choice. There wasn't even a little choice. It was a matter of no choice because where else could he go? If he went some place else, nobody else was going to guarantee the bonding for him on his BIA projects. And if he went to somebody else, Arizona Refining would have pulled the plug on the bonding; consequently, he would have had zip.

Mr. SOLLERS. Thank you.

Mr. DAY. You're welcome.

Senator DECONCINI. Mr. Day, what remuneration did Mr. or Mrs. Savala take from the company on a yearly basis? Did they get paid a salary?

Mr. DAY. Yes; a very minor salary, as far as I'm concerned. I make as much as they do.

Senator DECONCINI. Can you give us some range of what that salary was?

Mr. DAY. Mr. Savala made $55,000 last year, and the year before that I believe it was $32,000 to $33,000.

Senator DECONCINI. For doing $10 million worth of business?

Mr. DAY. Correct.

Senator DECONCINI. Who did the bidding for the Savala company? Who filled out the forms and did that? Did you participate in that?

Mr. DAY. In what area are you talking about, sir?

Senator DECONCINI. When you made a bid on a set-aside contract, or any contract, who did the actual physical filling out of the forms and submitting the bid and putting it together?

Mr. DAY. That's probably a two- or three-fold process at present time—I can only speak of since I have been there from October 1987—basically Manuel Savala, who is the treasurer of the company, actually puts the final documents together. I have the final say so as far as the final numbers are concerned. We have an estimator, Mr. Dan Villa. He gets quotes from various suppliers like material suppliers, concrete suppliers, equipment.

Mr. BARTOLOMEI. Excuse me one second. Let's go back to the question again. Were you talking prior to——

Senator DECONCINI. Yes; and thank you, counsel. Prior to.

Mr. DAY. Prior to—to the best of my knowledge, in all the documents that I have reviewed Arizona Refining put the bids together for them.

Senator DECONCINI. They actually put the bids?

Mr. DAY. Yes.

Senator DECONCINI. Did they do it there at the Savala contracting office, or did they send them to them?

Mr. DAY. I believe they did them in their own office.

Senator DECONCINI. They did them in their own office?

Mr. DAY. Here, again, like I said, David used to sign blank quote sheets.

Senator DECONCINI. I see. And send them down to Arizona Refining?

Mr. DAY. Yes; and they'd put the bid together. Then, when it was time to actually submit the bid, he would probably actually go in and sign the actual documents, themselves.

Senator DECONCINI. So Mr. Savala or Mrs. Savala had no idea what the contracts were as far as what the obligation was to pay for the supplies they were going to receive from Arizona Refining?

Mr. DAY. I would think they would have no idea in the world.

Senator DeConcini. From your knowledge they had no idea?

Mr. Day. Yes.

Senator DeConcini. When the funds came from a contract that had been awarded to the Savala company how did payment come? Did it come to Savala Asphalt? And did you deposit it?

Mr. Day. Yes; from my researching records the money was basically wire transferred from the San Francisco office, I believe.

Senator DeConcini. Of HUD or whatever the contractor, or BIA, or whatever?

Mr. Day. Correct.

Senator DeConcini. To your account?

Mr. Day. Yes, sir.

Senator DeConcini. To the company's account?

Mr. Day. Savala Asphalt's account. Yes, sir.

Senator DeConcini. And then how did you handle the payment of Arizona Refining or anybody else? Did they sign an invoice, or did they call you, or what did you do?

Mr. Day. Here, again, in reviewing documents they were based on invoices. In other words, when Arizona Refining submitted invoices to Savala, when Savala received money they would pay Arizona Refining and they would pay for material supplies, etc.

Senator DeConcini. From other people?

Mr. Day. From other people.

Senator DeConcini. Just as they came in?

Mr. Day. Yes, sir.

Senator DeConcini. Mrs. Savala, your husband said in his affidavit that you invested about $90,000, and you said you weren't sure. I take it over a long period of time you put in bits and pieces of money. Is that why you're not sure?

Mrs. Savala. That's correct. And therefore I wasn't sure.

Senator DeConcini. Not sure what it is. But was it more than five or six times you put your money into the company?

Mrs. Savala. About 4 years, I think.

Senator DeConcini. About 4 years you were asked to put funds in. And who asked you to do it? Your husband?

Mrs. Savala. No; since I was keeping the books I had to pay the taxes, so——

Senator DeConcini. So you knew, yourself, that you didn't have the funds?

Mrs. Savala. Yes; I had to.

Senator DeConcini. In order to cover the checks. And did you make payments to Arizona Refining when you were handling the books?

Mrs. Savala. Yes; I did.

Senator DeConcini. And invoices would come in; is that correct?

Mrs. Savala. Yes.

Senator DeConcini. And you would just pay them?

Mrs. Savala. Yes; I did.

Senator DeConcini. And when you were running the company there who handled the bidding? Did Arizona Refining do the bidding?

Mrs. Savala. Well, since we're about 350 miles from Phoenix and David was out in the field working, I wasn't aware of how the bidding was coming through.

Senator DECONCINI. I see. When Arizona Refining was sold what date was that? I forgot from the affidavit.

Mr. DAY. I believe that was August 1986.

Senator DECONCINI. August 1986?

Mr. DAY. About that timeframe.

Senator DECONCINI. Mr. Day, maybe you can answer the question. How soon after that did the bonding stop or the guarantee of the bonding from Arizona Refining to Savala Asphalt?

Mr. DAY. It basically stopped before that.

Senator DECONCINI. Do you remember what time?

Mr. DAY. I would say probably 6 months prior to that.

Senator DECONCINI. Were you notified officially, or what happened?

Mr. DAY. I don't think there was any communication at all about it. I think they just didn't pursue any more BIA jobs. I think the intention was when the gentleman came in—his name was Mr. Burnett—from Arizona Refining was to sell the company, and I don't think they had any desire to stay in that market or of any market. His job was to sell the company.

Senator DECONCINI. Do you know if there was any talk about selling Savala Asphalt?

Mr. DAY. Pardon me?

Senator DECONCINI. Was there any discussion about selling the asphalt company? The company you worked for?

Mr. DAY. Not to my knowledge.

Senator DECONCINI. And without guaranteeing of the bonding by Arizona Refining it, in essence, in your judgment, made them uncompetitive? Is that why they dropped? Or was it more to it than that?

Mr. DAY. Well, not in being uncompetitive. You couldn't even bid on the job because you couldn't get bonding.

Senator DECONCINI. Couldn't even get bonding?

Mr. DAY. Yes—unless it was a supply contract, which are very small contracts compared to construction contracts. Supply contracts, during that era, did not require bonding, but they were few and far in between compared to construction contracts.

Senator DECONCINI. Roughly what are the liabilities now of Savala Asphalt? Are they thousands or hundreds of thousands of dollars that they owe?

Mr. DAY. Savala Asphalt?

Senator DECONCINI. Yes.

Mr. DAY. I would think so.

Senator DECONCINI. Is the company currently involved with active construction work?

Mr. DAY. Yes, sir; we are.

Senator DECONCINI. So you have some basis, even without bonding, of continuing operation?

Mr. DAY. We received bonding, but we went through the Individual Surety Company which, I'm sure that you are aware, are very expensive. And I also understand from my reading that some day down the road they may be eliminated, so you're back to a corporate surety again which is, again, a difficult process.

Senator DECONCINI. I have no further questions.

Senator Daschle, do you have any questions?

Senator DASCHLE. I'd like to clarify a couple of your responses to the chairman. One was regard to gross income. The gross income, as I understood your answer to the chairman, was $10 million; is that correct?

Mr. DAY. Yes, sir.

Senator DASCHLE. You said the compensation provided Mr. Savala and Mrs. Savala was $55,000?

Mr. DAY. That was in 1988. In that era that I'm talking about when the gross revenue was $10 million his salary was $32,000.

Senator DASCHLE. It was less than the $55,000?

Mr. DAY. Yes, sir.

Senator DASCHLE. Do you recall, at least in general terms, what the net income was?

Mr. DAY. I think they showed a loss for the year.

Senator DASCHLE. Out of the $10 million?

Mr. DAY. Yes, sir.

Senator DASCHLE. They showed a loss?

Mr. DAY. Yes, sir.

Senator DASCHLE. You're an accountant. Can you explain how that happened?

Mr. DAY. Well, it is quite simple. As I stated earlier, when a company grows from $800,000 to a $10 million company, first of all they weren't structured, they weren't organized, they did not have the financial capability, they didn't have the staff, they didn't have the construction expertise to handle even a $1 million company at that particular time, let alone a $10 million company.

Senator DASCHLE. So these were capital costs that——

Mr. DAY. Yes, sir.

Senator DASCHLE. I see. Were they one-time capital costs?

Mr. DAY. Not really capital costs. When you talk about construction contracts and revenues and construction cost revenues, basically what that means is that the cost of the revenues exceeded the construction revenues, period. In other words, their construction costs consist of labor, labor burden, materials, equipment, subcontracts, and indirect costs, which would be like your bonding, your testing, your engineering, and stuff like that. Those costs actually exceeded the contract revenues.

Senator DASCHLE. In that year within which the Savalas received compensation of about $32,000, what was the level of compensation for executives in Arizona Refining?

Mr. DAY. I would say they were definitely into six figures.

Senator DASCHLE. Six figures?

Mr. DAY. It may have been higher. I don't have any idea. But I would say at least six figures.

Senator DASCHLE. So you're saying that there is a possibility that Arizona—more than a possibility; likely a probability—that during the time that the company was losing money because of the tremendous investments they were providing themselves with a salary in the six figure level? Did I understand you correctly?

Mr. DAY. Yes. I would think—and, again, as I stated earlier, one of the problems they had was the actual cost of the product, one; and, two, on other projects, and even on the supply contracts, you cannot—any good businessman today cannot go out there and pay $175 for something and sell it for $177 and expect to operate a business. With those kinds of low margins it is impossible to pay salaries, maintain an office, to grow, to go out and obtain equipment, to obtain all the things that are necessary to run a business. And even if you only—here, again, the same scenario: 1,000 tons is a lot of oil. Arizona Refining would get $170,000 and Savala Asphalt would get $2,000. The equities just aren't there. What can you do with $2,000 to run a business? Not very much.

Senator DASCHLE. Was there any understanding prior to assigning of any contracts with Arizona Refining with regard to the equity in compensation? Was it understood that it was going to be based upon the relative percentage of ownership in the firm? How——

Mr. DAY. I don't think that had anything to do with it.

Senator DASCHLE. There was nothing related to——

Mr. DAY. There was never anything in writing with Arizona Refining as far as a split, per se. They billed Savala Asphalt for the product, period, at a high rate. And, as in the affidavit, Mr. Savala stated that when Mr. Bagley from Arizona Refining basically kept hounding him to go into this minority thing to get Indian preference contracts, he guaranteed him that they would never lose any money. That was never the case. As you can see——

Senator DASCHLE. He guaranteed them in writing that he wouldn't lose any money?

Mr. DAY. No.

Senator DASCHLE. This was just an assurance?

Mr. DAY. This was one of those, you know, like putting a carrot in front of a horse and saying, "Hey, come and get it." He enticed people. Here, again, if I was in a situation and somebody said, "I'm going to guarantee you twice the money you made last year, plus all these other things that are possibilities, and you could be a rich man some day"——

Senator DASCHLE. So they guaranteed them that they would make money?

Mr. DAY. Yes.

Senator DASCHLE. And, second, they indicated that they would be paying $32,500 in compensation for that year?

Mr. DAY. No; the compensation was set by Savala Asphalt people, themselves. Gevene Savala, the board of directors, they set their own salaries. Arizona Refining had nothing to do with setting their salaries.

Senator DASCHLE. I see.

Mr. DAY. They have regular board meetings and they ascertain what a maximum compensation that, for example, Mr. Savala can obtain this year. That has already been determined right now for 1989.

Senator DASCHLE. Were Mr. and Mrs. Savala cognizant of how much money the executives in Arizona Refining were making as they determined what their salary ought to be?

Mr. DAY. I don't believe so.

Senator DASCHLE. Mrs. Savala, could you answer that question? Did you know how much Arizona Refining was making on the same contracts as you were deciding what your salary would be?

Mrs. SAVALA. No.

Senator DASCHLE. You had no idea?

Mrs. **Savala**. No; I had no idea.

Senator **Daschle**. Mr. Day, how is it that you feel so confident that they were making salaries in the six figures?

Mr. **Day**. Well, the reason why I feel this way is that my understanding is that Mr. Bagley had a good income, but he also had a bonus clause, and it is all based on how much product you sell. Here, again, he was selling in a new market that he could not have gotten into otherwise.

Senator **Daschle**. He had a bonus clause that he wrote into the contract?

Mr. **Day**. No, no; this was with—Arizona Refining is owned by Union Oil. It was a subsidiary of Union Oil, Unocal. I'm just talking about his compensation with Unocal.

Senator **Daschle**. I see.

Mr. **Day**. So it is my understanding that he got compensated for the more product he sold. It's like everything else—the high priced salesman.

Senator **Daschle**. I suppose I could go on with this line of questioning for some time, Mr. Chairman. I realize that there is—I'd only ask, just to clarify: none of this was apparent to the Savalas as they were entering into this contract? In other words, of the aggregate amount, the gross income received, Savalas were not a part of the decision-making with regard to the salaries provided executives in the Arizona Refining?

Mr. **Day**. Yes.

Senator **Daschle**. They did not make any decisions with regard to the capital costs incurred by Arizona Refining, even though this was a partnership, as I understand it; correct?

Mr. **Day**. Well, in a sense it was. Yes.

Senator **Daschle**. And so they were relegated to a position of being really an employee?

Mr. **Day**. Correct.

Senator **Daschle**. Rather than a partner in this particular arrangement?

Mr. **Day**. That would probably be my opinion, too, that it's just an extension of Arizona Refining.

Senator **Daschle**. And were compensated—even though this arrangement is understood—about one-tenth of what the executives at Arizona Refining received?

Mr. **Day**. Yes, sir.

Senator **Daschle**. Thank you.

Senator **DeConcini**. Thank you, Senator Daschle.

Senator McCain, do you have any questions?

Senator **McCain**. No, Mr. Chairman; thank you.

Senator **DeConcini**. Fine. Does counsel have any further questions?

Mr. **Brandolino**. No, Mr. Chairman.

Senator **DeConcini**. Thank you very much, Mrs. Savala and Mr. Day. We appreciate your testimony here today.

The committee will take a 5-minute recess.

[Recess.]

Senator **DeConcini**. Mr. Aubrey is our next witness.

[Witness sworn.]

STATEMENT OF WILLIAM H. AUBREY, PRESIDENT OF BLAZE CONSTRUCTION

Senator DeConcini. Mr. Aubrey, the questioning will begin by counsel, Mr. Sollers, and will be pursuant to procedures that we will follow here today on immunization.

Mr. Sollers. Sir, please state your full name for the record.

Mr. Aubrey. William H. Aubrey.

Mr. Sollers. Mr. Aubrey, what is your relationship to Albert DeAtley?

Mr. Aubrey. On the advice of counsel I am asserting my Fifth Amendment privilege against being compelled to provide testimony that might tend to incriminate me.

Mr. Sollers. Mr. Chairman, the witness has refused to answer a question posed to him by the special committee. I request the chairman of the special committee to communicate the immunity order to Mr. Aubrey.

Senator DeConcini. Mr. Aubrey, I am hereby communicating to you an order issued by the U.S. District Court for the District of Columbia. The order provides, in substance, that you may not refuse to provide evidence to the special committee on the basis of your privilege against self incrimination. It provides that evidence obtained from you under the order may not be used against you in any criminal proceedings. A copy of the order is at the witness table and, without objection, will appear in the record.

[Order issued by the U.S. District Court for the District of Columbia directed toward William H. Aubrey follows:]

FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS The United States Senate Washington, D.C. 20510, Applicant.	Misc. No. 88-344

ORDER

Upon consideration of the application by the Senate Select Committee on Indian Affairs, and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this 1st day of November, 1988,

ORDERED That William ("Bill") Aubrey may not refuse to testify, and provide other information, at proceedings of the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against William ("Bill") Aubrey in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

Aubrey E. Robinson, Jr.
Chief Judge

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, Clerk

By Linda L. Romero
Deputy Clerk

Exh. 1
1/12/89 [illegible]

Senator DeConcini. Pursuant to the order, I direct you to answer the questions put to you by Mr. Sollers.

Mr. Aubrey, the immunity procedure is complete. Mr. Sollers will continue the questioning. Thank you, sir.

Mr. Aubrey. Thank you, Mr. Chairman.

Mr. Sollers. Mr. Aubrey, where do you live?

Mr. Aubrey. Yakima, Washington.

Mr. Sollers. How are you employed, sir?

Mr. Aubrey. I am the president of Blaze Construction.

Mr. Sollers. You are the owner of Blaze Construction; is that correct?

Mr. Aubrey. That's correct.

Mr. Sollers. And does Blaze Construction qualify for Indian preference work?

Mr. Aubrey. Yes; it does.

Mr. Sollers. And how does it so qualify for such work?

Mr. Aubrey. I am an enrolled Blackfeet Indian and 100 percent owner of the firm.

Mr. Sollers. And is it the case that you are 1/8 Blackfeet Indian?

Mr. Aubrey. That's correct.

Mr. Sollers. Now, you have been a contractor for how long?

Mr. Aubrey. Since 1963.

Mr. Sollers. What type of contracting work do you do?

Mr. Aubrey. Early on we did speculative house building in the private market, and some time in 1977 I started doing various HUD projects—some Indian, some non-Indian.

Mr. Sollers. Now, Mr. Aubrey, is there difficulty as a start-up contractor in obtaining bonding?

Mr. Aubrey. Yes; there is.

Mr. Sollers. And what is the problem? Why is it so difficult?

Mr. Aubrey. Well, the sureties issue bonds based on past performance of work and the financial capabilities or responsibilities of the firm.

Mr. Sollers. Did you, in fact, have some problems with getting bonding early on yourself?

Mr. Aubrey. Yes; I did. In one instance, in particular, in 1979-80 I sought out a bond by way of a brokering firm, and in that instance I did get a bid bond from them, and I did, in fact, bid. I was subsequently awarded that given project; however, the firm that I had contacted was unable to furnish the performance bond for the project.

Mr. Sollers. And, as a result, did you suffer a substantial loss?

Mr. Aubrey. Yes. I had pre-paid $120,000 for that particular service in addition to the other costs that I had incurred.

Mr. Sollers. Did you lose the whole $120,000?

Mr. Aubrey. Yes; I did.

Mr. Sollers. Now, did these problems with obtaining bonding as an individual entity lead you to start looking into joint venturing?

Mr. Aubrey. Yes; it did.

Mr. Sollers. Early on in your contracting career did you, in fact, enter into several different joint ventures?

Mr. Aubrey. Yes; I have had several joint ventures.

Mr. Sollers. Now, when did you start Blaze Construction?

Mr. AUBREY. In March 1983.

Mr. SOLLERS. Shortly after you formed Blaze Construction did you enter into a joint venture with Halvorsen Construction?

Mr. AUBREY. Yes; I did. That was the second joint venture of Blaze Construction.

Mr. SOLLERS. Why did you enter into the joint venture with Halvorsen?

Mr. AUBREY. For the purposes of bidding on a Yakima Indian Nation project in the year 1983—I believe late 1983.

Mr. SOLLERS. Was there an agreement with Halvorsen as to how profits would be split?

Mr. AUBREY. Yes; the profits were to be split 51/49, with 51 being Blaze's interest.

Mr. SOLLERS. Did Halvorsen, however, also get a fee on top of the arrangement?

Mr. AUBREY. Yes; the joint venture agreement provided for a $200,000 management fee to be paid to Halvorsen prior to the split of the profits.

Mr. SOLLERS. What was the bottom line on that relationship? Did you make a substantial profit?

Mr. AUBREY. I believe the amount that was disbursed in the end was approximately $150,000, of which I received 51 percent.

Mr. SOLLERS. Who had performed all the work on the project?

Mr. AUBREY. Blaze Construction had performed all of the work, short of some minor accounting that was done in their home office.

Mr. SOLLERS. Had Halvorsen received its $200,000 management fee?

Mr. AUBREY. Yes; that was paid early on or through the course of the project.

Mr. SOLLERS. Your profit would have been somewhere in the $70,000 range; is that correct?

Mr. AUBREY. That's correct.

Mr. SOLLERS. Now, were you satisfied with the results of that relationship?

Mr. AUBREY. No; I was not. It not only had the $200,000 management fee which I was unhappy with, but additionally there was some langauge in the joint venture agreement in that if they were unhappy with the performance of Blaze Construction the ultimate control would be that of Halvorsen.

Mr. SOLLERS. So, in fact, Halvorsen was controlling the operation; is that right?

Mr. AUBREY. Well, that's not quite right, but they could if they saw the need to do so.

Mr. SOLLERS. Now, did this lead you to meet with an Albert DeAtley?

Mr. AUBREY. Yes; it did.

Mr. SOLLERS. Was that in the spring of 1985?

Mr. AUBREY. That's correct.

Mr. SOLLERS. Who is Albert DeAtley?

Mr. AUBREY. He owns several construction businesses in the central Washington—and I believe central Oregon—area.

Mr. SOLLERS. Did you reach a tentative agreement with Mr. DeAtley to indemnify you on construction projects?

Mr. AUBREY. Yes; I did. The initial agreement was for just one project, and I provided a service to him, and he was to provide indemnification on a given project.

Mr. SOLLERS. Did you then subsequently obtain indemnification from Mr. DeAtley on further projects?

Mr. AUBREY. Yes; shortly thereafter several other projects came up to bid, and he did provide indemnification for those projects.

Mr. SOLLERS. Now, what was the arrangement on this first group of contracts?

Mr. AUBREY. On the first group of contracts—and I believe it was my idea—we had not come to any agreement on what the fee might be. I think at that time there was about $4 million in housing projects, and just around $900 to $1 million in road projects that we were looking at. And I suggested to him that I pay a fee equal to the profits that could be made off the four road jobs.

Mr. SOLLERS. In return Mr. DeAtley was to provide you with what?

Mr. AUBREY. Indemnification for bonding, and he did provide some assistance on the bidding of the road projects.

Mr. SOLLERS. So I take it that Mr. DeAtley would provide you with indemnification, allowing you to obtain bonding on the entire package of projects, that is, the road construction jobs and the housing jobs; is that right?

Mr. AUBREY. That is right.

Mr. SOLLERS. In return you were to pay Mr. DeAtley the profits on the road jobs, themselves; is that correct?

Mr. AUBREY. That is correct.

Mr. SOLLERS. Was this a verbal agreement?

Mr. AUBREY. Yes; it was.

Mr. SOLLERS. Was there any written agreement with Mr. DeAtley at that time?

Mr. AUBREY. Yes; we had a written indemnification agreement that did not call out for any special amounts for fees for any given projects. It was just a general agreement.

Mr. SOLLERS. Has there ever been a written agreement with Mr. DeAtley which specifies the amount of fees that he is to be paid for indemnifying you in bonding?

Mr. AUBREY. No; there has not.

Mr. SOLLERS. Did Mr. DeAtley's companies also receive some subcontracts with regard to this first group of contracts?

Mr. AUBREY. Yes; they did subcontract a portion of the one road project.

Mr. SOLLERS. Now, Mr. Aubrey, did your company begin to grow very rapidly?

Mr. AUBREY. Yes; shortly after that time there was not much opportunity for additional projects in the northwest area, and I was seeking out other work, and I eventually ended up in the southwestern United States.

During that time we had bid on approximately eight or nine projects, and in some instances some of them were re-bid and they weren't awarded right away. Then after about a 3 or 4 month period we were being awarded something around $20 million in construction projects in the southwest.

Mr. SOLLERS. What caused you to enter the southwest market?

Mr. AUBREY. There just weren't additional contracts available at that time, or projects to bid at that time, in the northwest.

Mr. SOLLERS. How would you characterize the market in the southwest?

Mr. AUBREY. I suspect I would characterize it as soft. It was extremely easy for Blaze to bid on those jobs and be the successful bidder with a reasonable mark-up.

Mr. SOLLERS. Was there a lack of qualified bidders under Indian preference in the southwest?

Mr. AUBREY. There were bidders on all the projects—several of them on some of them. However, most of them were not what I term "real Indian contractors."

Mr. SOLLERS. And what do you define as a "real Indian contractor?"

Mr. AUBREY. One that is not a front.

Mr. SOLLERS. Is fronting a substantial problem?

Mr. AUBREY. I believe it is.

Mr. SOLLERS. By the end of September 1986, your fiscal year, what was the gross amount of contracts that had been indemnified by Mr. DeAtley for your benefit?

Mr. AUBREY. I think the gross amount by September—was that September 1986?

Mr. SOLLERS. That's correct.

Mr. AUBREY. Approximately $30 million.

Mr. SOLLERS. Did Mr. DeAtley take steps to secure his indemnification of Blaze?

Mr. AUBREY. Yes; that was done in late 1985 by the indemnification agreement that I talked about earlier.

Mr. SOLLERS. Did Mr. DeAtley request that he have a security interest in Blaze's assets in return for indemnifying you on bonding?

Mr. AUBREY. Yes; he did, not unlike what the bonding company requires of him, or a bank.

Mr. SOLLERS. Now, was this security interest that Mr. DeAtley have in Blaze kept discreet?

Mr. AUBREY. Yes; it was.

Mr. SOLLERS. How was it kept discreet?

Mr. AUBREY. It was in the name of "Robert B. Sheldon Trust," I believe.

Mr. SOLLERS. Who was Robert Sheldon?

Mr. AUBREY. I don't know who he was. I think someone in the law firm who drew up the agreement maybe.

Mr. SOLLERS. I take it Mr. Sheldon did not have anything directly to do with Blaze Construction, Albert DeAtley, or any of Mr. DeAtley's companies other than to be a lawyer in a law firm used by Mr. DeAtley; is that right?

Mr. AUBREY. That's correct.

Mr. SOLLERS. This security interest was set up in his name; is that true?

Mr. AUBREY. That's true.

Mr. SOLLERS. Whose idea was the security interest?

Mr. AUBREY. I'm sure it was Mr. DeAtley's, as well as the attorney who was drafting the agreement.

Mr. SOLLERS. In any event, it was not your idea; is that right?

Mr. **Aubrey**. I had no objection to it. It really amounted to UCC-1 filings to protect his interest if I did not complete the project.

Mr. **Sollers**. Now, let's talk just a little bit about your financial relationship with Mr. DeAtley. By the end of 1986 did you actually meet with Mr. DeAtley to decide how much you owed him in indemnification fees?

Mr. **Aubrey**. Yes; we discussed it on several occasions.

Mr. **Sollers**. What did he request of you at that time?

Mr. **Aubrey**. Well, we had lots of conversations with different concepts. He wanted certain amounts that I guess I didn't agree to—and I don't know that we even did agree at that time. However, we did, on the financial statement of Blaze, recognize a $480,000 fee for bonding indemnification.

Mr. **Sollers**. Did Mr. DeAtley actually request of you a 60 percent fee, which would be 60 percent of net revenues?

Mr. **Aubrey**. I think that was one of the conversations earlier on, maybe in the late fall of 1986.

Mr. **Sollers**. And, again, you're performing all the work on these jobs; is that correct?

Mr. **Aubrey**. That's correct.

Mr. **Sollers**. Mr. DeAtley's request was a 60-percent fee—60-percent percentage of net revenues; is that true?

Mr. **Aubrey**. That's true.

Mr. **Sollers**. That was in return for indemnifying your bonding; is that correct?

Mr. **Aubrey**. That's correct.

Mr. **Sollers**. What was your reaction to this request?

Mr. **Aubrey**. Well, of course, I didn't like it. But I think we ended up with a general understanding of what it would be eventually.

Mr. **Sollers**. But that general understanding was $480,000; is that correct?

Mr. **Aubrey**. That's correct.

Mr. **Sollers**. Were you happy with that figure when you settled on it?

Mr. **Aubrey**. Not entirely; however, the statement was needed to be published for additional bonding. That's a review thing that is done annually. I guess I just decided to let that number be the number that represented the bonding fees on the financial statement.

Mr. **Sollers**. Is that the number you put on your tax returns?

Mr. **Aubrey**. Yes; it is.

Mr. **Sollers**. At some point did you actually pay that $480,000 to Mr. DeAtley?

Mr. **Aubrey**. Yes; I did.

Mr. **Sollers**. In addition to that $480,000 that was reported at the end of 1986 on your financial statement, had you paid Mr. DeAtley additional indemnification fees?

Mr. **Aubrey**. I think there were some additional, but—well, I know there was additional, but it depends on whose opinion of what our agreement was. Our agreement changed many, many times throughout the course of our first couple of years.

Mr. **Sollers**. And, again, there is nothing in writing?

Mr. **Aubrey**. No; there is nothing in writing.

Mr. SOLLERS. Now, what was the additional amount that was paid, as to your best estimate? And this is up to the point of 1986 where you declare the $480,000.

Mr. AUBREY. I don't know the exact amount, but I think it was something around $170,000. But that was for a period of time that was a little bit ahead of 1986, as well.

Mr. SOLLERS. Given the fact that there seemed to be at least some misunderstanding, if not disagreement, with regard to fees, why did you not ever put it in writing as to what the deal was going to be?

Mr. AUBREY. Well, I guess I thought that we would come to terms. We were developing a relationship that was getting stronger and stronger through the course of this first few years. And, second, when we talk about the financial statement and the $480,000 on September 30, I would think that at that time we still had outstanding contracts to finish—work in progress, in other words—of somewhere in the $20 to $25 million range.

So no matter what the agreement was I had an obligation to complete the work, and certainly Mr. DeAtley had an indemnification of all that work, as well. So I guess I wasn't too concerned. We'd eventually get it worked out. Neither one of us could remove ourselves from the arrangement, in any event.

Mr. SOLLERS. In fact, it was a mutually-beneficial arrangement; is that correct?

Mr. AUBREY. Yes; it is.

Mr. SOLLERS. Still is today?

Mr. AUBREY. Still is. Yes.

Mr. SOLLERS. There is still not a written agreement on fees; is that correct?

Mr. AUBREY. No; there is not.

Mr. SOLLERS. Did you eventually decide with Mr. DeAtley, at least verbally, as to what percentage of your net revenues would be paid to Mr. DeAtley for indemnification fees?

Mr. AUBREY. Yes; eventually—and I don't know the exact time, but some time later we agreed on an indemnification fee of up to 50 percent of the net operating revenue.

Mr. SOLLERS. Up to 50 percent of net operating revenue?

Mr. AUBREY. That's correct.

Mr. SOLLERS. How much do you currently owe Mr. DeAtley in indemnification fees? That's up to the end of fiscal year 1988, which would be September 1988 for you.

Mr. AUBREY. This is only an estimate because our audited statement is not quite finished yet, but something around $1 million.

Mr. SOLLERS. You have continued to perform all the work on the jobs that Mr. DeAtley has indemnified; is that correct?

Mr. AUBREY. That's correct.

Mr. SOLLERS. Has Mr. DeAtley made loans to Blaze Construction?

Mr. AUBREY. Yes; he has. Those loans started, I believe, in August of this past year.

Mr. SOLLERS. Is it actually in the form of a revolving line of credit?

Mr. AUBREY. Yes; it is.

Mr. SOLLERS. How much do you owe—and by "you" I mean Blaze Construction—Mr. DeAtley currently for loans?

Mr. **Aubrey**. I think that number is around $2.2 million.

Mr. **Sollers**. What is the purpose of those loans?

Mr. **Aubrey**. Just operating loans.

Mr. **Sollers**. Mr. Aubrey, Blaze Construction has been very successful, has it not?

Mr. **Aubrey**. Yes; it has.

Mr. **Sollers**. Do you know whether it is the largest Indian-owned general contractor?

Mr. **Aubrey**. I would have to believe that it is. I'm sure it is.

Mr. **Sollers**. The committee has had a lot of discussion today about fronts and Indian-owned companies set up solely to obtain work for non-Indian companies. You, however—and by "you" I mean Blaze Construction—perform all of the work on your projects; is that correct?

Mr. **Aubrey**. That's correct.

Mr. **Sollers**. Do you employ native Americans?

Mr. **Aubrey**. Yes; we're very proud of the record that Blaze Construction has with regard to employment of local Indians on the reservations we're working on. In fact, the past year 1988 the employment dollar figures for local Indian preference was in excess of $6.5 million.

Mr. **Sollers**. What percentage of your employees are native American?

Mr. **Aubrey**. Around 80 percent.

Mr. **Sollers**. Have you made loans to Indian-owned subcontractors in attempts to assist them?

Mr. **Aubrey**. Yes; to assist them to get into business. Many of those loans—I'm sure 30 or more, or maybe even more than that.

Mr. **Sollers**. Has Blaze Construction performed work for various government agencies?

Mr. **Aubrey**. Yes; it has.

Mr. **Sollers**. For what Government agencies have you performed work?

Mr. **Aubrey**. Housing and Urban Development, Bureau of Indian Affairs, the FAA, and some smaller military projects, as well.

Mr. **Sollers**. Have you ever disclosed the backing of Blaze by DeAtley to any Government agency?

Mr. **Aubrey**. No; I have not.

Mr. **Sollers**. Are you aware that the Bureau of Indian Affairs sent a letter to Seaboard Surety, your bonding company, trying to find out if Mr. DeAtley would complete work if Blaze defaulted on a job?

Mr. **Aubrey**. Yes; I am.

Mr. **Sollers**. Were you consulted by Seaboard Surety before they responded to this Bureau of Indian Affairs letter?

Mr. **Aubrey**. Yes; I was.

Mr. **Sollers**. Were you aware that Seaboard did not disclose the indemnification of your company by Mr. DeAtley?

Mr. **Aubrey**. Yes; and I'd like to explain that a little bit. They did answer the request properly. They answered it as what was available to them the way they keep their files on Blaze Construction. And they did answer properly without withholding any information as per the request.

Mr. SOLLERS. Seaboard was aware, was it not, that Mr. DeAtley is indemnifying Blaze Construction?

Mr. AUBREY. Oh, yes, they were.

Mr. SOLLERS. They had an indemnification agreement on file from Mr. DeAtley; is that correct?

Mr. AUBREY. Yes; they did.

Mr. SOLLERS. Mr. Aubrey, are you also the owner of a company called High Tech Recycling?

Mr. AUBREY. Yes.

Mr. SOLLERS. What is its business?

Mr. AUBREY. It is attempting to get into waste reclamation business.

Mr. SOLLERS. Are you currently attempting to obtain waste disposal contracts on the Navajo Reservation?

Mr. AUBREY. Attempting to get permitted for that type of work, yes.

Mr. SOLLERS. When did you begin that process?

Mr. AUBREY. First part of 1988—probably January.

Mr. SOLLERS. If you are able to get permitted and establish a site on the reservation, what size disposal contracts would you hope to obtain?

Mr. AUBREY. Well, that is really an unknown thing. We just would hope that if we could get permitted and get a facility up—which I'd like to state the investment in one of those facilities is around $30 or $40 million—that we would hope that we could solicit enough generators, especially in the California area, to quite possibly have a $30 million annual business or something like that in gross sales.

Mr. SOLLERS. The plant would be located on the reservation; is that correct?

Mr. AUBREY. Yes; it would.

Mr. SOLLERS. The Navajo Reservation. Is it required that you obtain substantial permits and other clearances from the tribe?

Mr. AUBREY. Yes; I think approvals might be a better description of it.

Mr. SOLLERS. Do you know Peter McDonald, Sr.?

Mr. AUBREY. Yes; I do.

Mr. SOLLERS. Are you aware that he is the chairman of the Navajo Tribe?

Mr. AUBREY. Yes; I am.

Mr. SOLLERS. How long have you known him?

Mr. AUBREY. I think I first met him shortly after the election.

Mr. SOLLERS. This is the last election?

Mr. AUBREY. Yes; the last election. I'm sorry.

Mr. SOLLERS. Would that have been some time after November 1986?

Mr. AUBREY. Yes.

Mr. SOLLERS. Do you know his son, Peter McDonald, Jr.?

Mr. AUBREY. Yes; I know him.

Mr. SOLLERS. Does he go by the name Rocky?

Mr. AUBREY. Yes.

Mr. SOLLERS. Did you hire Peter McDonald, Jr., as a consultant for $6,000 a month to work on the High Tech Recycling contract?

Mr. AUBREY. To assist in the approval process with the Navajo Nation. It made sense to hire a Navajo who was familiar with all the requirements of their government, as well as the local chapters, as well.

Mr. SOLLERS. Does Rocky McDonald have a consulting business called ROMAC?

Mr. AUBREY. Yes; he does.

Mr. SOLLERS. Is that with whom you contracted?

Mr. AUBREY. Yes; it is.

Mr. SOLLERS. When did you enter into that contract with Rocky McDonald?

Mr. AUBREY. In February 1988.

Mr. SOLLERS. Is Rocky McDonald to be your liaison with the various tribal chapters?

Mr. AUBREY. Yes; he was to do that kind of work insofar as assembling the proper people to get together for meetings, hearings, et cetera, like that.

Mr. SOLLERS. Who was present during an initial meeting which occurred in California to discuss this consulting contract with Rocky McDonald?

Mr. AUBREY. Myself, an employee of mine, Paul Wood, the chairman, and Rocky McDonald.

Mr. SOLLERS. So Chairman McDonald was present during a meeting which was at least part of the negotiating process in setting up this consulting agreement?

Mr. AUBREY. I think he made the introduction of Rocky to Paul Wood. I was in and out of a portion of that meeting.

Mr. SOLLERS. Paul Wood is an employee of yours?

Mr. AUBREY. That's correct.

Mr. SOLLERS. Why did you hire Rocky McDonald to perform this work and not some other individual?

Mr. AUBREY. It appeared that he had the abilities to get the type of work done that we needed—getting the proper people together, arranging the meetings for presentations, et cetera, like that.

Mr. SOLLERS. Was another factor that Rocky McDonald is the chairman's son?

Mr. AUBREY. That's a factor, but not a substantial one.

Mr. SOLLERS. After you began negotiating for these leases and permits on the reservation did you receive a phone call from your employee, Paul Wood, about a request from Peter McDonald, Jr., Rocky McDonald?

Mr. AUBREY. Yes; I did.

Mr. SOLLERS. When did you receive this phone call?

Mr. AUBREY. I think about mid-March 1988.

Mr. SOLLERS. And what did Mr. Wood say to you at this time?

Mr. AUBREY. He stated to me that Rocky had made a loan request through Paul, because I think he had a better relationship, or at least a closer relationship with Paul than with myself.

Mr. SOLLERS. Did he tell you how much money Rocky McDonald was requesting of you?

Mr. AUBREY. Yes; he did.

Mr. SOLLERS. How much?

Mr. AUBREY. He requested $36,000.

Mr. **Sollers**. Had Rocky McDonald told Mr. Wood what he wanted the money for?

Mr. **Aubrey**. I don't know if he did at that time.

Mr. **Sollers**. Did you subsequently have a conversation yourself with Rocky McDonald?

Mr. **Aubrey**. Yes; a day or two later he did call.

Mr. **Sollers**. Did you agree to make the loan?

Mr. **Aubrey**. Yes; I did.

Mr. **Sollers**. Did Mr. McDonald, Jr., tell you at this time what the money was to be for?

Mr. **Aubrey**. Not at that time I don't think. The conversation was more with how he would pay it back, and that was by way of the sale of a given piece of real estate in the southwest or in the Arizona area.

Mr. **Sollers**. Did you know specifically what piece of real estate this was?

Mr. **Aubrey**. I think he may have told me; however, I don't recall at this time.

Mr. **Sollers**. Did you agree to make the loan?

Mr. **Aubrey**. Yes; I did.

Mr. **Sollers**. Did you transfer $36,000 to Rocky McDonald?

Mr. **Aubrey**. Yes; I did.

Mr. **Sollers**. What was the term of the loan?

Mr. **Aubrey**. I think the original one, I believe, was a demand note. And then we have some additional amendments or addendums to the note, and I think the term was October 1—the final term.

Mr. **Sollers**. There have been a couple of extensions on this demand note; is that correct?

Mr. **Aubrey**. One for sure, maybe two. Yes.

Mr. **Sollers**. What was the last date which appeared?

Mr. **Aubrey**. I think October is the last date.

Mr. **Sollers**. Have you received any payments on this loan?

Mr. **Aubrey**. Not as yet.

Mr. **Sollers**. Did you secure the loan with the piece of property?

Mr. **Aubrey**. No; I did not.

Mr. **Sollers**. In fact, is the property anywhere mentioned in the loan document? The promissory note?

Mr. **Aubrey**. No; it is not.

Mr. **Sollers**. Did you file any sort of UCC statement on the loan?

Mr. **Aubrey**. No; I did not. Again, I have had conversations with Rocky McDonald on a monthly basis, and the loan is discussed, and I still believe as soon as the real estate is sold I will be repaid.

Mr. **Sollers**. You don't know what piece of real estate this is, do you?

Mr. **Aubrey**. No; I do not.

Mr. **Sollers**. At the time the loan was made you were negotiating for leases and permits on the Navajo Reservation which hopefully would enable you to obtain disposal contracts eventually of $30 million or so annually; is that correct?

Mr. **Aubrey**. Yes; it is a very long process. We're talking several years. Additionally, Rocky had made some agreement that if I got very concerned about the loan I could reduce the monthly payments and apply it against the loan.

Mr. SOLLERS. What monthly payments are you talking about?

Mr. AUBREY. The ROMAC contract.

Mr. SOLLERS. Have you ever reduced that monthly payment to Rocky McDonald of $6,000 per month to pay off the loan?

Mr. AUBREY. No; I have not.

Mr. SOLLERS. You have been paying him that $6,000 a month since when?

Mr. AUBREY. Since either March or—probably April was the first one. Maybe the end of April.

Mr. SOLLERS. Have you ever mentioned to anyone from the committee that you had this additional agreement with Rocky McDonald?

Mr. AUBREY. Pardon me?

Mr. SOLLERS. Have you ever mentioned during deposition or any other time that you had an additional agreement with Rocky McDonald to reduce his $6,000 a month consulting fee to pay off the loan?

Mr. AUBREY. I believe that was in my deposition.

Mr. SOLLERS. Did you subsequently find out what the $36,000 went to pay?

Mr. AUBREY. Through third-party hearsay I did find out. Yes.

Mr. SOLLERS. What did the $36,000 go for?

Mr. AUBREY. It was told to me that it was used for schooling or tuition or something for his sisters.

Mr. SOLLERS. For Rocky McDonald's sisters?

Mr. AUBREY. Yes.

Mr. SOLLERS. Those are the daughters, of course, of Chairman McDonald; is that correct?

Mr. AUBREY. Yes.

Mr. SOLLERS. Did you learn that—informed that you had made this money available to Rocky McDonald?

Mr. AUBREY. Maybe I assumed that or something, or maybe I assumed that, but it was some long time later—several months.

Mr. SOLLERS. Did you find out that the chairman had been informed that you were the source of these tuition payments?

Mr. AUBREY. I think it may have been mentioned by Paul Wood to me—not directly from Rocky or the chairman, as I recall.

Mr. SOLLERS. Have you also learned that a car that you leave at the Albuquerque Airport is frequently used by Chairman McDonald?

Mr. AUBREY. I have learned that just this past week from Paul Wood that on a few occasions he has used it. But that's a car I have left there for the last couple of years, and many, many people have used it. It is not specifically for anyone. It is for the use of employees who come to the area, various other people that visit us—subcontractors, etc.

Mr. SOLLERS. Did you fly Chairman McDonald and some of his friends to Las Vegas in the Blaze airplane?

Mr. AUBREY. Yes; I did.

Mr. SOLLERS. When was that, sir?

Mr. AUBREY. That was I think January 1988. I'd like to explain that a little further in that there was a meeting set up on a Friday evening with Bruce and Evelyn Yazzie by Paul Wood. That's a Navajo-owned electrical firm. We were going to talk about doing some business with them either by way of subcontracting or maybe a potential joint venture.

When I arrived, Paul Wood, Bruce and Evelyn Yazzie, and the chairman and his wife were there. It so happened that it happened to be Evelyn's birthday, and some time through the course of dinner it was suggested that since it was Evelyn's birthday it would be nice if we flew over to Las Vegas, and that's how that came about.

Mr. SOLLERS. What was the purpose of the trip?

Mr. AUBREY. I guess it was Evelyn's birthday, and it was just something for all of us to go do together.

Mr. SOLLERS. Where did you all stay?

Mr. AUBREY. The Tropicana.

Mr. SOLLERS. Is that a casino?

Mr. AUBREY. Yes; it is a casino.

Mr. SOLLERS. Did you stay in rooms that were complimentary to you—and that "you" means everybody in the party—from the casino?

Mr. AUBREY. Yes; that's correct.

Mr. SOLLERS. Did you leave the next day?

Mr. AUBREY. Yes; I left the next morning.

Mr. SOLLERS. How did you leave?

Mr. AUBREY. Commercial aircraft.

Mr. SOLLERS. Was the Blaze airplane left for the chairman and his friends who stayed on for an extra day or so?

Mr. AUBREY. Yes; for Bruce and Evelyn and the chairman and his wife and Paul Wood, if he stayed that long. But, as I understand it, Paul Wood left some time after I did.

Mr. SOLLERS. He left commercially, as well, correct?

Mr. AUBREY. That's what I understand.

Mr. SOLLERS. The Blaze airplane stayed on for the chairman and his friends, correct?

Mr. AUBREY. Yes; the initial meeting—I don't want this to sound out of context—was really with Evelyn and Bruce Yazzie, and they are as much a part—if not more— than the chairman on this issue.

Mr. SOLLERS. Mr. Chairman, that concludes my questions.

Senator DECONCINI. Thank you, counsel.

Mr. Aubrey, going back to the contracts that you got into with DeAtley—and even some before that—I think you are probably the Nation's largest native American builder; is that a fair statement?

Mr. AUBREY. I think so.

Senator DECONCINI. I think so, too. And you certainly have an exemplary record in the area of quality construction that I know of, and also of Indian employment. I want the record to demonstrate that.

What is surprising or shocking to this Senator is that with the success that you have had you were unable to bond yourself. You could not get the bonding that you needed without making some arrangement with DeAtley or others?

Mr. AUBREY. In the early stages that's a true statement. Blaze could now, however, get substantial bonding, but probably not in the amount that we wish to grow to for the future.

Senator DECONCINI. Even now today?

Mr. AUBREY. Even now today.

Senator DeConcini. So if you were going to do the Navajo recycling plant or any other contract of that size you would need some assistance to secure the bonding; is that safe to say?

Mr. Aubrey. Yes.

Senator DeConcini. Even today.

Mr. Aubrey. I think, in generalizing it, that Blaze, if it was to do its own bonding in its entirety, would have to consider cutting back the size of its operation as it exists today.

Senator DeConcini. Is that common, to your knowledge, of Indian contractors?

Mr. Aubrey. Yes; I'm sure it is.

Senator DeConcini. What about non-Indian contractors? Is it also common for them to take in other companies for bonding purposes? Do you know?

Mr. Aubrey. Yes. I'm sure it is. I think the joint venture is the way for a small Indian qualified firm to succeed.

Senator DeConcini. As far as a non-qualified Indian firm, how about off the reservation? Would that be necessary? Do you know?

Mr. Aubrey. It might be, if I understood the question correctly. One of the hardest places to receive bonding for areas is on an Indian reservation.

Senator DeConcini. That's what I want to get to. Thank you. So off the reservation it is, in your professional judgment, probably not as severe or the necessity being so great as it is when it is on the reservation?

Mr. Aubrey. I think that is a fair statement.

Senator DeConcini. If you were to do contracting—and I suspect you do—off the reservation, it is easier for you to get bonding for those jobs than it is on the reservation?

Mr. Aubrey. I only surmise that. We're doing some now, but it is hard to justify now because of the track record.

Senator DeConcini. Because of the success that you have had. And you didn't do off-reservation work before?

Mr. Aubrey. Not too much of it. No.

Senator DeConcini. It comes down, does it not, that you, as qualified Indian contractor, can't get the job if you don't have bonding; you can't get bonding if you don't make a split in contract with someone that, as you stated, didn't make you very happy; and no bonding, no split, no job. Is that a fair analysis?

Mr. Aubrey. I think that's fair. However, there are some firms—some of the original joint ventures that I had were absolutely straight up and the way it should be done.

Senator DeConcini. And give me an example of one of those straight ups of the way it should be done.

Mr. Aubrey. Blaze built the work and it was just a 51/49—no other agreements.

Senator DeConcini. No other agreements?

Mr. Aubrey. That's correct.

Senator DeConcini. That 51/49 split is what you would consider a normal surety or joint venture for the bonding purpose?

Mr. Aubrey. Yes; there might be a small other agreement if they did do certain paperwork or something or financing, but——

Senator DeConcini. If they did some real administrative work?

Mr. Aubrey. That's correct.

Senator DECONCINI. But these other fees we talk about are certainly extraordinary, to say the least, wouldn't you say?

Mr. AUBREY. Yes; I think something like one percent would be reasonable.

Senator DECONCINI. Would be reasonable?

Mr. AUBREY. Yes.

Senator DECONCINI. Thank you, Mr. Aubrey.

Senator McCain?

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Aubrey, for the benefit of a person that's never been engaged in your business, what would be the normal fee if you had a project and you needed bonding? If you could get it, what would be the normal fee?

Mr. AUBREY. If you didn't have someone indemnifying you?

Senator MCCAIN. If you did have someone indemnifying you qualified, how much would it—is it a percentage or is it a flat fee?

Mr. AUBREY. I think there is almost any kind of a negotiated deal out in the market place.

Senator MCCAIN. There are bonding companies, right? There are companies that are in the business of indemnifying people who qualify; is that right?

Mr. AUBREY. Yes; but I think those that you are indicating are private charities, and in most cases I think they are unacceptable. But when they are acceptable, I think I've seen rates as high as 5 percent of the gross.

Senator MCCAIN. As high as 5 percent of the gross is what you have seen generally?

Mr. AUBREY. Yes.

Senator MCCAIN. That's a little high above the norm?

Mr. AUBREY. In the private charity I think 5 percent—and, again, I mean the gross contract amount, not the gross profit.

Senator MCCAIN. I understand.

Mr. AUBREY. Anywhere from 1 to 5 percent, I guess.

Senator MCCAIN. From 1 to 5 percent of the gross would provide for the indemnification, given that you qualify for it, right?

Mr. AUBREY. If you qualify. It really depends, also, on the company. I think the greater the risk——

Senator MCCAIN. The higher the gross?

Mr. AUBREY. That's right.

Senator MCCAIN. But it ranges up to around 5 percent, to your knowledge?

Mr. AUBREY. That's correct.

Senator MCCAIN. Well, the information that I think we received from you is that at the end of 1985 DeAtley indemnified Blaze for bids on a group of six road projects and a number of other construction projects. In return, you agreed to pay DeAtley a fee equal to the profits made on all six road jobs. Is that a true statement?

Mr. AUBREY. It was four road projects, and the profits on the four road projects were estimated to be about $175,000.

Senator MCCAIN. Isn't that very unusual?

Mr. AUBREY. No; I don't think so, because he was indemnifying, at the same time, two or three other housing projects that were four times as much risk, and in dollar amount, as well.

Senator McCAIN. But for four road projects you paid DeAtley a fee equal to the profits made on all four road jobs?

Mr. AUBREY. Yes, sir; but at the same time he is indemnifying two or three other housing projects in the amount of $4 million or $5 million for which he receives nothing. These are going——

Senator McCAIN. Why not just work out an arrangement where you indemnify each project and pay a certain amount for each project?

Mr. AUBREY. Well, in this particular case the business was growing so fast—and, again, shortly after that time I was travelling a lot to the southwest. We're not talking about one project a month where you can sit down and negotiate it; we're talking about tens of projects and lots of money involved in either the fees or the gross amount of the contracts. So it was just such a fast thing—the growth and the amount of contracts that happened—that we just did not take the time to sit down and discuss it.

Senator McCAIN. On one of the road projects during this time a DeAtley-owned company performed approximately 40 percent of the work; is that true?

Mr. AUBREY. That's true.

Senator McCAIN. Is it normal on many of the projects that you were involved that DeAtley-owned companies performed a significant part of the work?

Mr. AUBREY. No; they've done virtually none of the work on any of the projects. That is the rare occasion that you are stating.

Senator McCAIN. In this particular case he indemnified you for bids on four road projects, you paid him the profits made on all four jobs, and on one of the road contracts he did 40 percent of the work—a company owned by him did 40 percent of the work.

Mr. AUBREY. Yes.

Senator McCAIN. It sounds like a pretty good deal to me, Mr. Aubrey.

Mr. AUBREY. I think it was a pretty good deal for both companies. He happened to own one of the few paving/road surfacing firms in that area, and I suspect whether I did the project or not a DeAtley-owned company would have done a substantial amount of subcontracting on that project.

Senator McCAIN. Is it normal, in your business dealings, to enter into agreements without written contracts?

Mr. AUBREY. Yes.

Senator McCAIN. It is normal?

Mr. AUBREY. At least that's—I guess that's the way I have done it. I can't add up the numbers, but I have got a list of firms here that we really don't have an agreement with—Indian subcontractors—and I think there are probably 35 or 40 of them that we make advances to, loans to, advance payrolls for, for the benefit of Indian firms. We do that all the time, and that gets up into the hundreds of thousands of dollars in a given month.

Senator McCAIN. And you do that with a handshake?

Mr. AUBREY. Sometimes I have never met the folks.

Senator McCAIN. You do that just because someone picks up the phone and says they need some money to meet payroll and you send it?

Mr. **Aubrey**. Well, actually we do it for the reasons of Indian preference. Most of them are contractors which we have assisted in putting into business on their given reservations. I might add that's another dollar number we are very, very proud of. On the local reservations we subcontracted for in excess of $7.5 million with smaller Indian firms through the course of last year.

Senator **McCain**. How large a company staff do you have, Mr. Aubrey, that works in your headquarters?

Mr. **Aubrey**. I think about 14 in the Yakima office, and maybe another 10 or 11 in the Albuquerque office, and another 4 or 5 in Anchorage.

Senator **McCain**. Are they all too busy to start writing up contracts?

Mr. **Aubrey**. I think if we tried to document everything we have done in the past three years we wouldn't have done anything. The growth has just been faster than we could keep up with, and fortunately we have been able to complete the projects with a great degree of quality.

Senator **McCain**. The growth has been so fast that neither you nor your staff have had time to engage in the time-honored practice of written contracts?

Mr. **Aubrey**. I think that's true. And maybe we wouldn't even have done that in many of them anyway. That's not a common—I guess we're not too concerned about that.

Senator **McCain**. Thank you, Mr. Chairman.

Senator **DeConcini**. Does counsel have any further questions?

Mr. **Sollers**. No, Mr. Chairman.

Senator **DeConcini**. Mr. Aubrey, thank you for your testimony and cooperation with the committee. We appreciate your candidness and your performance here today. We may ask some further questions to you, and we will do it with advising your counsel. Thank you.

Mr. **Aubrey**. Mr. Chairman, I have a written statement I'd like to submit for the record if that would be possible.

Senator **DeConcini**. We will be glad to receive the statement, Mr. Aubrey.

[Prepared statement of Mr. Aubrey follows:]

SPECIAL COMMITTEE ON INVESTIGATIONS
SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

STATEMENT BY
WILLIAM H. AUBREY
PRESIDENT, BLAZE CONSTRUCTION, INC.
January 31, 1989

Mr. Chairman and Members of the Committee, I would first like to thank the Special Committee for providing me with the opportunity to testify today on the subject of Indian construction contract preference.

As the President and sole stockholder of Blaze Construction, Inc., and as an enrolled member of the Blackfeet Indian Tribe, I have had the opportunity to experience firsthand the obstacles and challenges faced by Native American Indian-owned construction firms in the Western United States.

I applaud the Committee's detailed and thorough examination of all the facets of Indian preference and its expressed interest in ensuring that the laws are written to meet worthwhile policy objectives, are fairly and objectively implemented and, based on actual experiences, are achieving the goals they are written to meet. I am confident that the Committee's work will contribute to the preservation and improvement of the operation of Indian preference laws so that others will have the opportunity to enjoy the same level of success achieved by Blaze.

From its modest beginnings in 1983 as a 6-person operation, Blaze has developed into a company which today employs hundreds of Indians and builds tens of millions of dollars in construction projects annually. I am told that Blaze has now become the largest 100-percent Indian-owned construction firm in the United States.

I am proud of Blaze's record in several respects. Blaze is the largest private employer of Indians among all building contractors in the United States. From 1983 to the present, Blaze has employed approximately 3,500 persons, of which over 75% are Indians. In the past year alone, Blaze has employed between 450 and 600 persons depending on the number of projects under construction; currently, Blaze has about 500 employees, of which about 410 are Indians. Last year, our local Indian employment was $6.5 million, and that amount was left right on the reservations where we worked.

On the issue of local Indian employment, incidentally, I believe that more should be done to limit the size of the outside core crew that can be brought into the reservation, a practice that often occurs at the expense of local Indian employment. I am proud to be a member of the advisory committee that is considering this very issue in the context of assisting in the restructuring and rewriting of the Department of Housing and Urban Development ("HUD") regulations governing Indian preference under section 7(b) of the Indian Self-Determination and Education Assistance Act.

Blaze not only employs more Indians (and more local Indians), but we undertake the responsibility to educate and train our Indian employees to provide them with the skills necessary to become successful in all trades of the construction industry long after their initial involvement with Blaze is over. Blaze has distinguished itself in the area of Indian education and training programs and had been recognized repeatedly by Indian tribal organizations and officials in this regard. I have attached to this statement a sample of letters Blaze has received commending its record.

I am also proud of the high quality of the finished work product that Blaze builds. Blaze housing and road projects have been completed to the highest standards and the satisfaction of Indian tribal authorities without the chronic delays, change orders, and cost overruns common to many of my competitors. In fact, since 1983, it is a fair statement that Blaze has saved the Federal Government and the American taxpayers in excess of $13 million by performing quality work for less money. (This calculation is based on the approximate dollar amount of the difference between Blaze's bid and the second lowest bid, with the greatest disparities occuring in the Southwest and Denver regions.) Once again, Blaze's accomplishments in this area have been documented on numerous occasions. Attached to this statement is a sample of letters Blaze has received from its satisfied customers.

I am also proud that Blaze has been able to help finance Indian subcontractors, to the extent of $7.5 million in the local Indian community, and has made numerous loans to Indian subcontractors. While I do not solicit such arrangements, I am glad to provide this financial assistance, without which many of these businesses could not get off the ground. There is a substantial pool of talent on the reservations that many people overlook. With a relatively small amount of start-up money, these dedicated people can and do become productive, quality subcontractors.

Blaze competes and operates throughout the entire Western United States. From its main office in Yakima, Washington, Blaze built upon its experience in housing construction in the Pacific Northwest, and expanded its operations to include road construction projects in the Southwest U.S. under the supervision of our Albuquerque, New Mexico office. Since 1983, Blaze has successfully completed road and housing projects in fifteen states (Alaska, Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Utah, South Dakota, Washington, and Wyoming) on over 33 Indian reservations. Today, 80 to 90 percent of Blaze's work is on Indian preference projects, with the remaining 10 to 20 percent being non-Indian work. In Blaze's most recent fiscal year (ending September 1988), we constructed $43 million in total projects, and expect to build another $60 million this fiscal year. I have attached to this statement a list of all construction projects of Blaze to date.

This record has not been easy to achieve. During my own involvement in the construction business over the past 28 years, I have had to overcome considerable obstacles to achieve the level of success that Blaze now enjoys. I know that many other Indian contractors that work diligently and are well qualified are not able to overcome such hurdles. While the principles underlying Indian preference laws are fundamentally sound, and while I believe such laws are being properly administered for the most part, I feel that more could be done to assist Indian firms to get on their feet in the construction industry.

Perhaps the most significant difficulty faced by fledgling businesses, which is often an outright barrier to market entry for many, is the requirement of obtaining bonding as a necessary condition of being awarded a construction contract.

Any builder, Indian or non-Indian, will tell you how hard it is to get bonding when you are trying to start or expand a construction business. I can certainly understand why a customer would want a bond, and I agree that especially when taxpayer funds are used to pay for a construction project, the contractor must be required to obtain bonding. The various types of bonds -- bid, performance and payment -- provide necessary protection for all concerned. As difficult as the bonding requirement has been for those of us in the Indian community who are seeking to enter into the construction business, I have to admit that the absence of a bonding requirement would likely tempt many shoddy operators into the business and would create far more abuses than have occured under the current system. Bonds are expensive, difficult to obtain, and an obstacle to Indian and non-Indian alike, but they are certainly necessary for the customer's and taxpayer's protection.

The bonding company, for its part, wants protection, too. The bonding company will want the right combination of sufficient assets, guarantees, accounts receivable and experience, so that it is not taking an imprudent underwriting risk. The Committee can see how all too often the most conscientious and able Indian contractor is not in a position to satisfy the bonding company's rigorious requirements.

So bonds are clearly a major obstacle to the would-be Indian contractor. I believe my own experience in this regard is instructive. A year or so after I first began doing housing construction as a workman in 1961, I started William Aubrey Associates, a housing subcontracting business in the Seattle, Washington area, doing primarily framing, siding, and construction work. From approximately 1964 to 1974, William Aubrey Associates performed general contracting housing work, building spec homes, and developing lots and subdivisions. But the impact of the severe economic downturn in the Seattle area forced that company to file for bankruptcy. After surviving by doing piecemeal work for other contractors, in 1976 I formed IHN Development, Inc. with a non-Indian partner who owned 49 percent of IHN.

Why did I do it this way? Bonding. I had to rely on the non-Indian and another joint venture with a non-Indian firm, Westgate Builders, because it was the only way to get bonding. I eventually bought out the non-Indian's interest in IHN and by 1978-79 I was able to get some bonding (less than $1 million) on my own, but not enough for larger projects.

In 1980, I tried another route to bonding. My regular bonding company was unwilling to provide $4 million in bonding for a Zuni Indian Reservation project, so I had a series of meetings with another bonding company, International Investments, Inc. I struck a deal whereby the bonding company agreed to furnish me a bid and/or performance and payment bond if I was successful in winning the bid. I had to advance $120,000 up front in exchange for the bid bond, and as it turned out I was low bidder on the job. But when the time came to furnish the final performance and payment bond, the company reneged on their obligation, and I was forced to forfeit the job. Despite a protracted lawsuit against the bonding company, in which I expended another $55,000 in attorney's fees, I never recovered a single penny of damages, and never recouped any of my original $120,000. Needless to say, that was a sobering lesson.

In 1980 or 1981, in order to get bonding, IHN formed a joint venture with Walsh Construction for a project on the Umatilla Indian Reservation, with Walsh providing the financing. By 1982, financial difficulties with IHN caused me to close down operations. IHN's bonding capacity had sunk to zero at that point.

In early 1983, I decided to make a fresh start by forming Blaze Construction. Blaze's first project was another joint venture with Walsh on a Lower Elwah Indian housing project. In 1984, Blaze entered into a joint venture with Halvorson Construction to bid on a $5.7 million Yakima Indian Nation housing project in which Halvorson provided the bonding. Despite the success of the project, Blaze still had no substantial bonding capacity on its own at this point. (I probably could have obtained bonding for projects in the $300,000 to $400,000 range on my own.) I was not able to build larger projects or to operate independently of individual joint venture arrangements for each project until I was able to obtain a more satisfactory arrangement with respect to bonding.

In 1985, a banker friend of mine who knew of my bonding difficulties first introduced me to Albert DeAtley. Mr. DeAtley and I discussed my need for bonding, and after a series of negotiations, we reached an agreement by which he would provide bonding for Blaze. The level of compensation to Mr. DeAtley in exchange for this service has changed over time as our relationship has evolved. Mr. DeAtley has placed substantial assets at risk in guaranteeing Blaze's performance on tens of millions of dollars of construction projects.

In recognition of the value of that service, and I emphasize that without that service Blaze could not have obtained the level of bonding it required, Mr. DeAtley has been fairly compensated. Admittedly, Mr. DeAtley is a shrewd businessman and obtaining his bonding services has not come cheaply. But when you consider the value to Blaze, to the hundreds of Indians who have been employed by Blaze, and to the many Indians who live in Blaze-constructed homes, I would have to say that Mr. DeAtley's services have been worth every penny. Moreover, by obtaining bonding through Mr. DeAtley (as opposed to a more restrictive joint venture arrangement), I was given the freedom to remain faithful to the principles of Indian preference. I control Blaze's operations, I bid and build the jobs, and Blaze has certainly profited from this arrangement.

With respect to Indian preference generally, I urge the Committee to consider the positive benefits that are realized under the existing preference system. A preference is not a quota. There are no guarantees that Blaze will be awarded any portion of the available projects on which it bids. Indians are still required to compete with non-Indian construction firms for the award of certain contracts, and it has been Blaze's experience that we are able to outbid other firms by significant margins not because we are Indians, but because we simply are more efficient in building better houses and roads.

Without the Indian preference laws, Blaze might still survive, but many Indian construction firms would not, and many others would never be established. Certainly, legislative reforms of the Indian preference system could be designed to help the process function more efficiently. I would also encourage the Committee to explore ways to facilitate Indian firms' ability to obtain the bonding that they so desperately need to be successful in the construction business. However, I would caution against any remedial action that might compromise the basic principles underlying Indian preference -- namely, that Indians should have an advantage in bidding to obtain contracts for projects that benefit Indians on reservations, in order to promote the federal objective of reservation economic development and self-sufficiency, and that as a socially and economically disadvantaged minority, Indians sometimes require the federal government's assistance in overcoming such societal barriers.

I appreciate having had the opportunity to address this Committee today on this important matter.

Senator **DeConcini**. Thank you.

Mr. **Aubrey**. Thank you.

Senator **DeConcini**. The committee will be in recess until 10 a.m. tomorrow morning, whereupon we will hear a witness, Mr. Kraig Kendall, contractor from the State of Oklahoma, and also a contracting officer for the BIA. In the afternoon at 2 p.m. we will go into executive session and return to public meetings at 3 p.m.

[Whereupon, at 4:16 p.m. the hearing was recessed, to reconvene at 10 a.m. on Wednesday, February 1, 1989.]

FEDERAL GOVERNMENT'S RESPONSIBILITIES TO AMERICAN INDIANS

WEDNESDAY, FEBRUARY 1, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC.

The special committee met, pursuant to recess, at 10:16 a.m., in room 216, Hart Senate Office Building, Hon. Dennis DeConcini (chairman of the committee) presiding.

Present: Senators DeConcini and McCain.

Staff present: Kenneth Ballen, J. Sedwick Soliers III, Andrew Klingenstein, and John Brandolino.

Senator **DECONCINI**. The Special Committee on Investigations will come to order.

Our first witness this morning is Mr. Kraig Kendall, a housing contractor from Oklahoma.

[Witness sworn.]

STATEMENT OF WILLIAM KRAIG KENDALL, HOUSING CONTRACTOR, OKLAHOMA

Senator **DECONCINI**. Would you please state your name and your residence, Mr. Kendall?

Mr. **KENDALL**. My name is William Kraig Kendall, and I reside in Franklin, TN.

Senator **DECONCINI**. Mr. Kendall, I am going to ask Chief Counsel Ken Ballen to proceed with the questioning.

Mr. **BALLEN**. Thank you, Mr. Chairman.

Mr. Kendall, what is your business?

Mr. **KENDALL**. I'm a building contractor.

Mr. **BALLEN**. What kind of a building contractor are you, sir?

Mr. **KENDALL**. Primarily residential construction. I do some multi-family and light commercial work also.

Mr. **BALLEN**. How long have you been in the construction industry?

Mr. **KENDALL**. I started in 1969.

Mr. **BALLEN**. Where have you been located in this industry?

Mr. **KENDALL**. Primarily in central Oklahoma.

Mr. **BALLEN**. During the time period that you have been in the construction business in Oklahoma, what was the total volume of your business?

Mr. **KENDALL**. I would say somewhere between $35 million and $40 million.

Mr. **Ballen**. This was for the period of the 1970s through the 1980s?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. Sir, did you participate in both public and Indian housing work?

Mr. **Kendall**. Yes; I did.

Mr. **Ballen**. What type of public and Indian housing?

Mr. **Kendall**. I built low rent, mutual help, conventional, turnkey units for both public housing authorities and Indian housing authorities.

Mr. **Ballen**. What was the total volume of the Indian housing that you worked on in Oklahoma?

Mr. **Kendall**. It was over $20 million.

Mr. **Ballen**. Sir, among your competitors during the period of time you were active in Oklahoma—were you among the largest contractors in the State? Or among the medium sized? Or the smaller?

Mr. **Kendall**. I'd say for a period of approximately 10 years I would have been in the top three.

Mr. **Ballen**. The top three contractors?

Mr. **Kendall**. That's right.

Mr. **Ballen**. Sir, could you describe which Indian housing authorities you contracted with and performed housing contracts on, and the approximate volume of each of those contracts where you built houses for Indian housing authorities?

Mr. **Kendall**. For the Pawnee, the Otoe-Missouri, the Absentee-Shawnee Housing Authorities, I did projects for them that were between $2 million and $3 million. I did a little under $15 million worth of work for the Chickasaw Housing Authority. I bid proposals or made proposals to several other housing authorities.

Mr. **Ballen**. Which housing authorities would those be that you bid proposals for?

Mr. **Kendall**. I bid projects for the Seminoles, Creeks, Sac and Fox, the Osage. I think that's all.

Mr. **Ballen**. Sir, to operate in the Indian set-aside or Indian preference market in Oklahoma, what was your method of operation?

Before you answer that, let me just ask you this question. When you bid housing contracts, who did you submit the bids to?

Mr. **Kendall**. As a developer, we submitted our proposals to a board of commissioners——

Mr. **Ballen**. For an Indian housing authority?

Mr. **Kendall** [continuing]. For the housing authority, that's right.

Mr. **Ballen**. Were these projects approved by HUD and did you negotiate with the Federal Department of Housing and Urban Development to get approval for the projects?

Mr. **Kendall**. Once we were selected as the developer by the governing board of the housing authority, then HUD had to concur in that selection. We negotiated the projects through HUD.

Mr. **Ballen**. Sir, to operate in the Indian set-aside or the Indian preference market what was your method of operation?

Mr. **Kendall**. Well, we had a construction company that had been in operation for several years, and we traced the ancestry of the wife of one of my partners back to an Indian roll number and transferred the majority of the stock of that corporation to her so that we could receive Indian preference on our proposals.

Mr. **Ballen**. Did she have any duties in running this company of which she became 51 percent owner?

Mr. **Kendall**. No; essentially, the only thing she did was to sign—just signatory type duties.

Mr. **Ballen**. This was done in order to gain Indian preference work?

Mr. **Kendall**. That's correct

Mr. **Ballen**. Did she share in the profits of the company?

Mr. **Kendall**. Just as the wife—she was a housewife. She shared in the profits just as the wife of the guy who was really doing the work.

Mr. **Ballen**. Did she have any qualification? Did she run the company in any way?

Mr. **Kendall**. No.

Mr. **Ballen**. Any experience in the construction industry?

Mr. **Kendall**. None.

Mr. **Ballen**. In essence, her only qualification was that she happened to be Indian?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. Did she attend bid presentations?

Mr. **Kendall**. Yes; on a couple of occasions she attended. We wanted her to just be there, to have her presence there, to point her out as the majority owner of the stock in that corporation. She didn't take part in the presentations or the proposals. She was just there.

Mr. **Ballen**. So she didn't exercise any management control or perform any other duties that one would normally associate with the owner and operator of a company?

Mr. **Kendall**. No; she was just there for appearances.

Mr. **Ballen**. In your experience in Oklahoma, sir, do you know of any other construction companies, your competitors, who were major contractors in the State of Oklahoma who had similar Indian fronts?

Mr. **Kendall**. Yes; I personally know of two others that were operating under similar situations. They had family members or relatives whom they had traced back to some degree of Indian ancestry, and they set up corporations similar to mine.

Mr. **Ballen**. Did you have conversations with some of your competitors?

Mr. **Kendall**. Yes.

Mr. **Ballen**. Who, for instance?

Mr. **Kendall**. Oh, there were two other major builders of Indian housing units. One was Jim Lee Development Company. One was Shawnee Construction Company. We had conversations with them about having "token Indians."

Mr. **Ballen**. Sir, when operating in the State, what corporations did you have perform the Indian housing work?

Mr. **Kendall**. I had several corporations that I participated in that we had set up over a number of years: Thompson Construction Company; K&T Homes; Quo-Vadis Development Company; Cinderella, Inc; Southwest Chemical Company.

Mr. Ballen. These were all corporations that you participated in?

Mr. Kendall. That's correct.

Mr. Ballen. How were these corporations used to perform the Indian housing work?

Mr. Kendall. Well, some of them acted primarily as subcontractors. In some instances we would want to submit a proposal and would manipulate the price of that proposal by submitting maybe five proposals on the same project through these different companies.

Mr. Ballen. Why would you do that?

Mr. Kendall. Well, there was no compelling reason for the housing authorities to accept the low bid on these projects, but we felt like it looked better if we weren't necessarily the high bid. So in submitting three to five proposals on one project we could at least assure ourselves of being somewhere in the middle.

Mr. Ballen. Sir, during your business in Indian housing work, how did you go about obtaining contracts from the various Indian housing authorities that you dealt with?

Mr. Kendall. Initially, when I set out to do mutual help and low rent Indian housing, I submitted proposals that I felt would be accepted just on a competitive basis. It was my understanding that the staffs would grade these proposals, and often the lowest and best proposal in the eyes of the staff would be selected.

Mr. Ballen. How were you graded by staff? Over what period of time did you submit these bids?

Mr. Kendall. I began submitting proposals in the early 1970s.

Mr. Ballen. Sir, how were you graded by the staff of the various housing authorities?

Mr. Kendall. Well, in the early years very often we were graded superior. I submitted proposals with our sites, our plans, our specifications and received superior grades from the housing authority staffs.

Mr. Ballen. As a result did you get any housing authority contracts?

Mr. Kendall. No; we didn't.

Mr. Ballen. What happened then?

Mr. Kendall. Well, after submitting a number of these proposals it became evident to me that if we were going to receive any of these units I was going to have to do something else in order to try to be chosen as developer on these projects.

Mr. Ballen. What was that something else?

Mr. Kendall. I felt like I was going to have to get in good enough with the people who were making the decisions relative to selecting the developer so that I could be chosen. In some instances that would be some fairly insignificant gifts, gratuities, that kind of thing. In other instances it just took some fairly serious bribes.

Mr. Ballen. Sir, were there any instances in all your $35 million worth of work where you simply had to do nothing? In other words, your bid was accepted without any gift, bribe, gratuity, or favor of any kind?

Mr. Kendall. Yes; there was one project out of the $20 million-odd worth of work that I did for the Indian housing authorities where I didn't have to do anything other than submit the proposal, but only one instance, and in that one instance I was the only bidder.

Mr. **Ballen**. What was that project?

Mr. **Kendall**. It was a conventional low rent project for the Otoe-Missouri Housing Authority.

Mr. **Ballen**. What was the approximate size of the project?

Mr. **Kendall**. Somewhere around $2.5 million, as best I can recall.

Mr. **Ballen**. Sir, you testified that there was a spectrum of things you had to do, from nothing in the Otoe-Missouri case to fairly insignificant gratuities to bribes.

On the end of the spectrum of "fairly minimal," could you describe specific instances of gratuities that you gave?

Mr. **Kendall**. Well, there seemed to be a correlation between the size of the housing authority, the number of units they were allocated, and what I had to do in order to obtain those units. In the case of the Pawnee Housing Authority, the Otoe-Missouri Housing Authority, the Cheyenne-Arapaho Housing Authority, I think I did a little over $2 million worth of work. About the same with the Pawnees.

I was able to get enough influence from the governing board by simply—I just called it "wining and dining" them. I took them out to eat quite a bit. I bought them small presents at Christmas, turkeys, hams, and whenever I was called upon to do so, I would throw them a party. That type of thing.

Mr. **Ballen**. Sir, what project did you do for the Absentee Shawnee Tribe?

Mr. **Kendall**. I was given a couple of projects for the Absentee Shawnees. I did one 50-unit project for them and was awarded the contract on another 50-unit project.

Mr. **Ballen**. Sir, what—if anything—did you do beyond submitting a bid to obtain those projects?

Mr. **Kendall**. Well, the Absentee Shawnee Housing Authority was a little larger housing authority than the ones I have previously mentioned. They received a larger allocation of units. I submitted several proposals to that housing authority and didn't receive any units, even though the grading on the proposals had been relatively high, if not the best.

Mr. **Ballen**. When you say "the grading on the proposals," what you are saying is that you submitted bids and the staff of the housing authority itself would grade you very high?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. You were not awarded the contract?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. What happened after that?

Mr. **Kendall**. Well, I attempted to ascertain who was pulling the strings at the housing authority to select me as the developer on these projects. I became involved at Indian housing authority meetings and so forth socially with the chairman of the housing authority. At that time I asked the chairman of the housing authority if he was a football fan and he indicated he was. I then asked him if he'd like some season tickets to the University of Oklahoma football games. Those were hard to come by. He said he'd very much like to have those.

When he told me that he wanted these tickets, it was a signal to me that if he would take those, I could probably garner influence from him in obtaining these units.

Mr. BALLEN. What happened after that? Did you give him the tickets?

Mr. KENDALL. I gave him the tickets, and he indicated to me that his cousin, who was the executive director of the housing authority and also had significant input in selecting developers on these projects, was also a football fan, and that it would probably be in my best interest to get him some football tickets also, which I did.

Mr. BALLEN. Subsequent to that what did you do?

Mr. KENDALL. Well, they were such football fans that shortly thereafter——

Mr. BALLEN. They seemed to like football a lot?

Mr. KENDALL. Yes; shortly thereafter I sent them both to the Orange Bowl, put them in a motel, bought them tickets to the parade, tickets to the game, and gave them—as best I can recall—$400 or $500 in cash to spend while they were down there.

Mr. BALLEN. Air fare to the Orange Bowl in Miami?

Mr. KENDALL. Right.

Mr. BALLEN. What happened then? Did you get a contract?

Mr. KENDALL. I received a 50-unit project shortly thereafter.

Mr. BALLEN. Did you have any further discussions with them or any further talk relative to future housing work after the 50-unit contract?

Mr. KENDALL. Yes; at that point I got close enough to them that I just made an outright deal with them to give them so many dollars per unit.

Mr. BALLEN. How many dollars per unit?

Mr. KENDALL. I believe the deal said it was $500 per unit.

Mr. BALLEN. What happened after that?

Mr. KENDALL. Well, I was to give them $500 per unit when I was selected as developer—I think I gave them $250 when I was selected and the balance of it after I signed the contract. My partner and I made a cash payment to the executive director of $5,000, and the chairman got his money simply by coming by the office a time or two a month and, sort of in a veiled way, telling me that I needed to—I think he used the term "grease the skids"—among some of the tribal officials. I would pretty much give him whatever he asked for. It was usually between $500 and $2,000 a time.

Mr. BALLEN. Small amounts of money, in essence?

Mr. KENDALL. Yes.

Mr. BALLEN. How much are we talking about in terms of these contracts? They were quite significant; they were in the millions, weren't they?

Mr. KENDALL. Several million.

Mr. BALLEN. In addition to the cash, did the chairman of the housing authority ask for any transportation?

Mr. KENDALL. Yes; I had a recreational van at the time, and the chairman told me he was going to take his children to Colorado on vacation and asked if he could use the van. I gave it to him and he kept the van for a couple of years. I provided the general maintenance on it. He bought the gas and I pretty much provided everything else for the van.

Mr. **Ballen**. Did he ever ask for anything else?

Mr. **Kendall**. On another occasion he told me he was still having some transportation problems and that he had spotted a car he would kind of like to have. He asked me if I would buy a car for him.

Mr. **Ballen**. What kind of car was it?

Mr. **Kendall**. A Porsche.

Mr. **Ballen**. Sir, where did you perform the majority of your housing work? With which tribe?

Mr. **Kendall**. As I said, I did a little over $14 million worth of work for the Chickasaw Housing Authority.

Mr. **Ballen**. How did your relationship start out with the Chickasaw Nation? Where are they located, sir?

Mr. **Kendall**. Their main office is in Ada, OK.

Mr. **Ballen**. All right. How did your relationship start out?

Mr. **Kendall**. I had bid several projects for the Chickasaws. They were a large housing authority, had a large staff, a lot of management people, and received a lot of units. I had bid several projects for that housing authority over a period of about three years and had not received any of the units. I had been receiving some of these units from the Absentee Shawnee Housing Authority at the same time, and it was fairly apparent to me that if I was going to get in with one of the big housing authorities I needed to make some arrangements to pay off someone who had something to do with the process of selecting the developer.

Mr. **Ballen**. What happened?

Mr. **Kendall**. Well, a fellow who was a builder and a developer in that area had recently been appointed as a commissioner to that housing authority. He approached me and indicated that he had a tract of land within the operational area of the housing authority that he would like to get rid of; that he would like to get out of the building business; that he was now a commissioner on the housing authority, and he asked me if I could help bail him out of that subdivision.

Mr. **Ballen**. Just to make sure that it's on the record, the chairman of the Absentee Shawnee Tribe Housing Authority that you gave the transportation and cash to, his name was Duane Ellis?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. The executive director of the housing authority—what was his name, sir?

Mr. **Kendall**. Glen Edwards.

Mr. **Ballen**. All right.

Now, sir, you testified that you did the majority of your housing work for the Chickasaw Nation, and you testified that your relationship started out there, that you bid fairly over a 3-year period, and you were graded well by the staff. Is that correct?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. What happened at that point in time, sir?

Mr. **Kendall**. As I said, I was approached by an individual who had recently been appointed as a commissioner on the housing authority. He indicated that he owned a piece of land within the operational area of the housing authority and asked me if I would be interested in bailing him out of that subdivision that he was involved in return for his support on the board in receiving some units.

Mr. **Ballen**. What was the name of this person?

Mr. **Kendall**. Claudell Overton.

Mr. **Ballen**. What occurred? Did you bail him out?

Mr. **Kendall**. Yes; I made a deal with him to take him out of the subdivision if in turn he would give me some units. I went to the bank and made arrangements to get him off of the financing and so forth, and ended up buying the subdivision from him.

Mr. **Ballen**. Did he mention something else to you that was necessary for you to get housing contracts from the Chickasaw Nation?

Mr. **Kendall**. He said he would personally do all he could to help us get the units, but if we were to have some serious influence we would probably need to figure out some way to help the Governor, who is the Chickasaw's chief or tribal chairman. He is called Governor.

Mr. **Ballen**. What was his name?

Mr. **Kendall**. Overton James.

Mr. **Ballen**. What happened at that point in time, sir, after he gave you that suggestion?

Mr. **Kendall**. Mr. Overton set up a meeting between my partner and Overton James. At that meeting they talked about how we'd like to have a number of units that they were just advertising. They mutually agreed that it would be appropriate to give him a campaign contribution at that time.

Mr. **Ballen**. How much was that campaign contribution?

Mr. **Kendall**. As best I can recall, it was around $500.

Mr. **Ballen**. Was that campaign contribution subsequently paid to Governor James?

Mr. **Kendall**. Yes.

Mr. **Ballen**. That was $500?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. What happened after that payment was made?

Mr. **Kendall**. Shortly after the payment was made we received a couple of significant contracts from the Chickasaws.

Mr. **Ballen**. How much were the contracts?

Mr. **Kendall**. I believe $6.5 million.

Mr. **Ballen**. When you were awarded the contracts by the housing authority board, what occurred at that point? Did you go to HUD and try to negotiate the contracts?

Mr. **Kendall**. Yes; once we were selected as the developer, then the developer's packet goes to HUD for their concurrence in the selection. However, we were having a problem with the staff of the housing authority at that time, and in those instances they had not graded our proposal as superior. As a matter of fact, they suggested to HUD that they would prefer to have another developer on the project—

Mr. **Ballen**. Beside yourself?

Mr. **Kendall**. That's correct. So we weren't successful in negotiating those projects at HUD.

We went back and told Mr. Overton and Governor James that we were not successful in negotiating these projects—

Mr. **Ballen**. That's because the staff of the housing authority didn't want them to go ahead with you because you weren't rated the best on that particular project?

Mr. **Kendall**. That's right. They were opposing us as the developer on the project.

Mr. **Ballen**. What happened then?

Mr. **Kendall**. We felt like the only way we could get the projects off high center was to make some changes in the staff at the housing authority. They subsequently held a special meeting of the housing authority at which time they fired most of the staff members who had opposed us on these projects. They appointed Mr. Overton as executive director, removed him from the board of commissioners and put him in a management position as executive director and appointed a new commissioner in his place.

Mr. **Ballen**. Did you have any trouble negotiating the contract with HUD after those changes were made at the housing authority?

Mr. **Kendall**. No; just a few days later we were successful in negotiating the projects.

Mr. **Ballen**. Right after Mr. Claudell Overton was appointed executive director, what did he ask you for?

Mr. **Kendall**. He told me he had some transportation problems also and would like to have a car.

Mr. **Ballen**. What kind of car did he want?

Mr. **Kendall**. A Lincoln Continental. I believe it was a Mark IV at that time.

Mr. **Ballen**. Did he also express a need for some additional cash?

Mr. **Kendall**. Yes; he said he was in kind of a financial bind and needed to supplement his salary as executive director of the housing authority, so I agreed through one of my companies—a chemical corporation I had a controlling interest in at the time—to give him $1,000 a month as a consulting fee.

Mr. **Ballen**. Did he do any work as a consultant?

Mr. **Kendall**. No.

Mr. **Ballen**. In other words, it was just a disguised payment?

Mr. **Kendall**. That's right.

Mr. **Ballen**. Now, sir, after you got this first series of contracts for $6.5 million, what if anything occurred with Governor James of the tribe?

Mr. **Kendall**. Well, Governor James owned a pallet corporation. A pallet is a portable platform that you use to transport material on. He owned a company that manufactured pallets. I received an invoice from this pallet corporation to one of my construction companies. As best I can recall, it was for around $2,000.

Mr. **Ballen**. What did you do with that invoice?

Mr. **Kendall**. I paid it.

Mr. **Ballen**. Did you receive any pallets?

Mr. **Kendall**. No.

Mr. **Ballen**. What happened after that?

Mr. **Kendall**. I received several other invoices on a fairly regular basis that varied generally from $2,000 to $6,000 for pallets that I was not receiving. I subsequently paid those invoices.

Mr. **Ballen**. Sir, did there come a point in time when these pallet invoices caused you some concern?

Mr. KENDALL. A couple of times they did. In one instance I became concerned that people on my staff were seeing these invoices from this pallet company come in to my office. They knew that we didn't have any use for pallets and never purchased pallets. So we made arrangements with Governor James to actually sell us a load of building materials, a load of lumber, through his pallet company where he actually acted as a broker, and we made a pretty big production out of making everyone aware that "here's a legitimate load of material that we've purchased from the pallet corporation." I sent people from my office down to make sure they saw the material, that type of thing.

Mr. BALLEN. You actually purchased some lumber legitimately?

Mr. KENDALL. That's correct.

Mr. BALLEN. Did you receive subsequent invoices for the lumber?

Mr. KENDALL. Yes; we received a legitimate invoice for the lumber in that instance.

Generally, I became concerned that we were purchasing such a large number of pallets that we needed to change that situation, so I just got a bunch of blank invoices from the pallet company. When I would receive a bill or a statement for $2,000 or $3,000, I would generally throw that statement away, transfer it onto another invoice so that it actually looked like material purchases, and mail it back along with a check to the pallet company or to Governor James.

Mr. BALLEN. Did there come a time when you started running those invoices through your chemical company?

Mr. KENDALL. Yes; I became concerned—I had been paying them through one of my construction companies and became concerned that that was not far enough removed. As I said, the construction company had no use for pallets, and it was a little unusual to be buying building materials through a pallet company. But I owned a controlling interest in a chemical corporation, Southwest Chemical Company, that sold corrosion inhibitors to drilling contractors all around the State of Oklahoma. They had a pretty good volume of business. Although we didn't use any pallets, very often chemical companies do use pallets in the transportation of materials, so I began to pay the invoices that time from my chemical company and would find a way to reimburse the construction company.

Mr. BALLEN. Sir, how much did the phony invoices from Governor James' pallet company total?

Mr. KENDALL. A little over $94,000.

Mr. BALLEN. Sir, in return for that how much in contracts did you get from the Chickasaw Nation?

Mr. KENDALL. A little over $14 million.

Mr. BALLEN. A fairly good investment, wouldn't you say?

Mr. KENDALL. Yes.

Mr. BALLEN. Why were the payments made by check instead of just giving the Governor cash?

Mr. KENDALL. Well, for two reasons. One, we didn't have that amount of cash available to us. We would have had to have written checks for cash, which would have been a fairly obvious flag and would have been very difficult to take a deduction on, so the primary reason was that we took a business deduction on the checks that we wrote to him.

Mr. **Ballen**. Now, sir, did you make any other payments to members of the board of commissioners of the housing authority while you were doing work for the Chickasaw Nation?

Mr. **Kendall**. Yes.

Mr. **Ballen**. What were they?

Mr. **Kendall**. I gave another commissioner a car. I believe it was a used Thunderbird. I did some extensive remodelling on another commissioner's house, I would say around $10,000 to $12,000 worth of remodelling. I made what we call loans to other commissioners with the understanding that those loans weren't to be repaid. There were no notes or anything signed.

Mr. **Ballen**. Was that a common technique, to have what was called a loan but in effect it was never collected?

Mr. **Kendall**. That's correct.

Mr. **Ballen**. Sir, in these instances were you approached by people or did you approach them?

Mr. **Kendall**. Both. In some instances the word got out that we were remodelling a certain commissioner's house, so another commissioner would approach us for a loan.

As best I can recall, the guy I gave the Thunderbird to—I don't think he asked for that. I think I just said, "I appreciate your giving us the units and I'd like for you to have this." He took it but I don't think he asked for it.

Mr. **Ballen**. Was there any direct understanding, with all these gifts and payments made, that you were going to receive a contract in return for these gifts and payments?

Mr. **Kendall**. Well, it was an implied understanding. We talked in rather veiled terms. When a commissioner approached me for a loan, that's what we called it, but we both understood the fact that I expected influence as far as getting these contracts in return for the loan.

Mr. **Ballen**. Is that your experience generally after 15 years in the construction business, that there was no direct conversation about bribes, that it was done in kind of a code language?

Mr. **Kendall**. Sure. Obviously, I wouldn't go to a commissioner and say, "I want to bribe you if you'll give me these units," or, "I want to pay you these kickbacks in return for these units." We didn't talk in those terms. The only case where I think those things were ever really mentioned was in the case of the Absentee Shawnee Housing Authority where we had an outright deal of so many dollars per unit, but even under those circumstances we didn't use the term "bribes" or "kickbacks" or that type of thing.

Mr. **Ballen**. Sir, did you ever attempt to bribe or seek to bribe any official at HUD during all these years?

Mr. **Kendall**. Yes; I did.

Mr. **Ballen**. Would you tell the committee about that, please?

Mr. **Kendall**. Well, in the early 1970s I was doing a great deal of FmHA and VA work, building homes that were financed under FmHA and VA programs, and it was fairly common during those years to give away some turkeys or some hams or peanuts, things like that, at Christmas to buy meals for FmHA people. And they were readily accepted. I don't recall ever having really garnered any influence as a result of having done that. It was just more of a business relationship.

Sometime—and I don't recall exactly when—it came to my attention that some sort of a directive was handed down where the Federal housing officials were prohibited from taking even a cup of coffee from a contractor, and that's exactly what they did. At the time I thought it a little ridiculous, but when a HUD inspector or FmHA inspector would come to the job site to make an inspection I would offer to go buy him a cup of coffee, and he would just turn me down and say, "No, I can't do that. I'll go drink a cup of coffee with you, but I'll pay for my own."

Mr. **BALLEN**. Did there come a time that you wanted to get football tickets to a particular individual?

Mr. **KENDALL**. Several years later, when I was fairly actively involved in the Indian housing programs, I remember offering some football tickets to a fellow in a cost section of a HUD office. He turned me down flat and just said, "Don't ask." I knew the guy was a big football fan and it certainly would have been in my best interest to be able to have some influence with him, but he just turned me down.

Mr. **BALLEN**. Sir, why was that important? If I understand your testimony correctly, at some point there was a rule or statute that went into effect that prohibited even the smallest of gifts from being given to Federal officials. Is that correct?

Mr. **KENDALL**. That's the way I understood it.

Mr. **BALLEN**. Was there any similar prohibition against giving such gifts to Indian officials?

Mr. **KENDALL**. Not to my knowledge.

Mr. **BALLEN**. Sir, why was that important in hindsight, that difference in statutes?

Mr. **KENDALL**. Well, as I said, at the time it didn't seem particularly important to me, but as I look back on it I can see it was fairly significant because generally, in all cases where I was able to garner influence from an Indian housing authority, it all started with a cup of coffee. Then it would go from there to a meal. If I were to take one of these people to a restaurant, a normal restaurant, and for lunch they ordered a $12 T-bone steak instead of a blue plate special, it became apparent to me that they wanted something from me, or I was going to be able to offer them more.

As I look back on it, with Governor James, that started with a cup of coffee and a $500 campaign contribution and went to $94,000 in bribes over a period of just a couple of years.

Mr. **BALLEN**. Sir, based on your experience of 20 years in the housing business as a developer, were there areas that you could exploit with HUD in order to obtain the most money possible on a project? Were there certain tricks you could use to get that money out of the Government?

Mr. **KENDALL**. I felt like there were some.

Mr. **BALLEN**. Could you describe some of those tricks to the committee?

Mr. **KENDALL**. There seemed to be a great deal of pressure on both HUD and the housing authorities toward the end of their fiscal year to get their projects out of the pipeline and into reality. We would often belabor negotiation so that it would get closer to the fiscal year and they would feel this additional pressure on them to get these units negotiated, and they became easier to deal with. They felt that if they didn't get them negotiated and get them under contract, that they stood a good chance of losing them.

So we felt that the closer we could get them to the end of the fiscal year, it would be in our best interest to do so.

In attempting to negotiate projects with HUD we would try to ascertain how their cost indexes were at the time of the negotiation conference. HUD generally stayed behind on their costs. We would try to catch a negotiation conference when costs were low but the cost indexes were high, and we would be given more money for the contract in that way.

Mr. BALLEN. Let me ask you this, Mr. Kendall. Was there a problem with the determination of real cost by HUD?

Mr. KENDALL. Well, there definitely was a problem. If HUD attempted to challenge me on what these costs were, I would invite them to contact local materials suppliers and verify the cost numbers I was providing to them. And I had prearranged with these materials suppliers that "If a HUD official calls you and asks you what a 2X4 costs, here's what you're to tell him." So——

Mr. BALLEN. So you spoke to those people in advance of the call by the HUD officials?

Mr. KENDALL. That's correct.

Mr. BALLEN. Therefore they gave the answers that you wanted given?

Mr. KENDALL. That's correct.

Mr. BALLEN. How about with change orders? Could you describe what a change order is and how it would work to a developer's advantage in public and Indian housing?

Mr. KENDALL. Well, a change order is an exhibit that effects some sort of a change from the original plans and specifications on a project. As a developer, it was important for us to understand how the budgets were established for these projects. We knew that there were a certain number of dollars set aside for changes which could be made, and there were always ways for us to try to garner all of those dollars that were set aside for changes. In some instances the housing authorities were even allowed to transfer management funds to construction funds, and if we had a good enough rapport with them to allow them to do that, we could garner more dollars through changes than what the original contract amounts were.

In some instances we would knowingly submit antiquated specifications that we knew we could come back in for later. If they were the housing authority's plans and specifications and we had the kind of rapport we wanted with them, we would often ask them to omit items from their plans and specifications that we knew would be allowable at a later date. We would tell them to advertise their projects without carports, for example, because we could come back in on a change later and get those carports added on and there would be a substantial profit in those.

Mr. BALLEN. Sir, could you describe the process of "front loading" that you would use as a developer?

Mr. KENDALL. Well, in some types of projects you are allowed incremental payments based on the amount of work that you have completed. For example, if you had a million dollar project and you had completed 20 percent of that work, you would generally be allowed a $200,000 payment on that project. We would attempt to front load the construction requests so that maybe we could get $400,000, get more money up front, and thus have the use of the money.

Mr. BALLEN. Sir, did there come a time when you pled guilty to a criminal offense as a result of your activities in the construction industry?

Mr. KENDALL. Yes.

Mr. BALLEN. And did you cooperate with the Government as a result of that?

Mr. KENDALL. Yes; I did.

Mr. BALLEN. Was there a difficulty in obtaining convictions because of the state of the law that we discussed?

Mr. KENDALL. Yes; they were fairly complicated cases because, as I understand it, there were no direct prohibitions against some of these activities, so the convictions that were obtained had to be mail fraud, conspiracy, that type of thing.

Mr. BALLEN. Sir, let me ask you this question. You described various processes that were used by you as a developer to get more money out of HUD. Do you have experience in talking to your competitors, whether or not these practices were generally used in the construction industry?

Mr. KENDALL. So far as garnering more money from the project?

Mr. BALLEN. Yes, sir.

Mr. KENDALL. Yes; I think they were very common.

Mr. BALLEN. Is there anything the Government can do to protect itself from developers who try to use these techniques?

Presumably HUD knows about some of these things. Why don't they try to crack down on it?

Mr. KENDALL. I think there are a couple of problems in HUD. One is expertise. Another is motivation. The developers are highly motivated to try to get every dime they can get out of these projects. We know how many dollars are available for them and we're going to do just whatever we can to attempt to get those dollars out of there. If I get another $50,000 because I delay a negotiation conference for a week, that's $50,000 that goes into my pocket. The guy I'm negotiating with is not motivated in the same way. He's going to go home at 5 o'clock.

I'm not saying that these HUD people are incompetent by any means. They do a good job at these negotiation conferences, but the motivation is a lot different. He's going to go home at 5 o'clock whether I get the money or don't get the money. It's not going to make a lot of difference to him, but it makes a lot of difference to me because it's going to be my money.

So I certainly don't want to undermine the necessity for housing these Indian people. I think that as a developer for close to 20 years I've seen the necessity for housing these people, and I think it is very necessary. But in my opinion, as the program now stands, it's pretty much in a shambles.

One thing that has to be done is to stop the type of corruption that I've been involved in personally. I think that as these hearings continue and as you ask other builders and other developers and other contractors who have worked on these projects, they are all going to tell you that if we could just go in there and bid these projects on a purely competitive basis and have a true selection process where the best bid was accepted, I think we would all prefer to do that. I know I would have preferred doing that. I tried doing that for several years and didn't get any units.

I think if it could be done where the thing was strictly competitive, then I think the program would work. I think the intent of the Indian housing program as it stands now is unclear. I think it needs to be better defined. I think it's much too broad. If the intent of the program is to provide safe, decent, and sanitary housing for qualified Indian occupants, then I think that goal can be met. But it's always been terribly unclear whether that was the goal or whether it was to provide opportunities for minority contractors or whether it was to provide employment for Indian people. I think those programs conflicted with each other at times.

One of the problems in the programs that we encountered, and I am sure that other developers encountered it, was in the mutual help program under which a preponderance of these units that I've talked about were built. Once the contracts were successfully negotiated with HUD and the total dollar amount was agreed on, HUD would then reduce our contract amounts. In our case, it was by anywhere from $1,250 to $1,500 per unit. They would tell us it was our responsibility to go to the person who was going to be living in that unit and get those funds from them as "sweat equity."

Well, that sounds good. It sounds like a good idea. Rarely does it work. We're dealing with single parent families who don't have the time to contribute that sweat equity toward those units. We're dealing with, sometimes, fairly elderly Indian families. I can't ask a 60-year-old lady with arthritis to come out and put shingles on that house; I'm not going to get that $1,500 from her.

So the cost to the program would go up because we wouldn't discount that house by that $1,250 to $1,500 for those reasons.

Mr. BALLEN. You built that cost into your——

Mr. KENDALL. We built the cost in.

Mr. BALLEN. So essentially the Government and the taxpayer just ended up picking up that cushion?

Mr. KENDALL. That's correct.

I think checks and balances can be established to stop some of the things I was guilty of. I think the inspectors need to be more adequately trained. I think the budget guidelines that HUD sets down need to be adhered to instead of ignored, as they were very often. And I think the use of competent consultants to help these Indian housing authorities is much needed.

Mr. BALLEN. Mr. Chairman, thank you very much. That concludes this testimony.

Senator DECONCINI. Thank you, Mr. Ballen.

I yield to Senator McCain for questions.

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Kendall, over the years that you were involved in this process did you see the situation worsen or improve as far as the various illegal practices are concerned?

Mr. KENDALL. Essentially I saw it remain the same. I didn't see any significant changes. I saw attempts made at change, but I didn't really see anything changing significantly.

Senator McCain. There was no doubt in your mind that many of your competitors were engaged in the same kind of activities that you were?

Mr. Kendall. That's right.

Senator McCain. Explain something to me that I don't quite understand. A house is built for a certain amount of money, and therefore it has certain specifications—bathrooms, ceilings, whatever—for a certain amount of money. If that money is not spent on the house, then that house is less than what that amount of money should provide. Do you see the logic here of what I'm saying?

And if that's the case, and because you were providing monies and gratuities and kickbacks, etc., therefore less than the contracted-for amount of money actually went into the construction of the house. Are you with me so far?

Mr. Kendall. Right.

Senator McCain. Then why would not an inspector, who is required to inspect this home, come out and say, "Hey, wait a minute. This is supposed to be a $70,000 house but there is only $50,000 worth of work in this house"?

Mr. Kendall. Well, there are several reasons. One, the way the inspection process was on these houses, it was generally done by inspectors who wouldn't have the slightest idea what you're talking about, who had no feel for what the total costs were. It was something they couldn't relate to at all.

HUD had the right to make periodic inspections. They did have a better feel for it than the Indian housing authority inspectors did, but they rarely made those inspections until the product was finished.

I can't recall instances where the real integrity of the product was compromised. Generally, the houses that were delivered to the various housing authorities were good products.

Senator McCain. How could it be a good product if you say that you're going to spend $70,000 on a house and you actually spend considerably less?

Mr. Kendall. Well, there was a substantial amount of profit in those houses. We took the monies that—as I said, over $14 million worth of work, and set aside maybe $150,000 of that to help us get those units. Well, I could get that $150,000 back in change orders alone.

Senator McCain. But the housing inspectors never, to your knowledge, said that your product was either bad workmanship nor less than the value that the house should be?

Mr. Kendall. I think the opportunity was there, if we had wanted to seize that opportunity, to build a substandard product; not just in my case, but in the case of any of the competitors that I was dealing with. It's been my experience that substandard products were not delivered.

I guess the bottom line is that they were paying us too much for those houses.

Senator McCain. Thank you, Mr. Kendall.

Thank you, Mr. Chairman.

Senator DeConcini. Mr. Kendall, just following up on a question from Senator McCain, in some Indian housing that I've looked at on reservations in Arizona they are obviously shoddy work, for reasons that I don't know. In one instance, several houses were built for some native Americans and there was no water to the house, yet it had been approved and the contractor had been paid for it. Have you come across any such examples as that?

Mr. **Kendall**. The opportunities were there for that type of activity. I'm not saying that they did not occur.

Senator **DeConcini**. You don't know of any?

Mr. **Kendall**. I just don't know of it.

Senator **DeConcini**. Now, Mr. Kendall, when you faced criminal charges and pled guilty, were there any Indian officials who also were prosecuted, either by the Federal Government or by tribal governments?

Mr. **Kendall**. I don't know of any officials who were prosecuted by tribal entities, but there were several prosecuted by the Federal Government.

Senator **DeConcini**. Were they convicted, to your knowledge?

Mr. **Kendall**. Yes.

Senator **DeConcini**. Some of the people you've mentioned here today in your testimony?

Mr. **Kendall**. That's correct.

Senator **DeConcini**. Now, you talk about the Indian set-aside program, and you raise a very cogent point as to what its objective is. From your testimony I presume that if the objective was to provide safe, clean housing to qualified native Americans, that you think some changes need to be made in that program?

Mr. **Kendall**. Yes; I do.

Senator **DeConcini**. Is one of those changes the set-aside requirement, that they are set aside for Native American contractors? Is that an obstacle to securing adequate housing under the Indian Housing Act, say?

Mr. **Kendall**. I just don't see how it would be possible to monitor that program. I think it's much too easy for non-minority contractors to establish sham corporations just like I did. And I've thought about that a great deal, but I can't come up with a solution. I don't see how it's possible to keep that from happening. I don't think it will work.

Senator **DeConcini**. So your observation is that it's an invitation to have corruption or fraud or fronts, or whatever you want to call it?

Mr. **Kendall**. In my opinion. That's correct.

Senator **DeConcini**. In your opinion we're asking for it?

Mr. **Kendall**. That's correct.

Senator **DeConcini**. In the area of sweat equity, were you ever able to find someone who truly did put some effort into their house?

Mr. **Kendall**. Initially we tried to do that. I know developers who would set up companies to build wall sections, and they would attempt to take all the participants in a certain mutual help project and put them in a factory building wall sections, that type of thing.

Senator **DeConcini**. For certain projects?

Mr. **Kendall**. For certain projects. I could never make the economics of that work out. But I also had another problem in insurance liability and that type of thing. I subcontracted all of my work. I didn't have anybody on the job who didn't have a worker's compensation insurance certificate and so forth. There was just too much liability to ask some unskilled person to come out there and participate in the construction of that house and break their leg, something of that nature. I'd prefer not to even have them on the job.

Senator DECONCINI. The risk was too high from the liability side to ask the potential occupant to come and even do menial tasks around there, from your standpoint?

Mr. KENDALL. That's how we felt.

Senator DECONCINI. You touched on this, about how widespread this was. In your opinion—and I realize it may be a little bit dated—but in your opinion do you believe this is going on now, the type of testimony you've given today that you've participated in?

Mr. KENDALL. Well, I haven't been involved in these programs for approximately 3 years, but I know of nothing that has changed.

Senator DECONCINI. You know of nothing that has changed in the area?

Mr. KENDALL. That's right.

Senator DECONCINI. Now, when you are involved in this type of activity where you are asked to give different types of gifts and cash and equipment, and you volunteered some of that yourself, was there any question in your mind what this was, that it was indeed a bribe, or to influence the outcome of it?

Mr. KENDALL. No question whatsoever.

Senator DECONCINI. No question in your mind. And the recipients, there was no question in your mind that they understood what was happening?

Mr. KENDALL. I'm sure they did.

Senator DECONCINI. You touched on dealing with BIA and HUD officials. You did not find any of those individuals who were receptive to minor gifts or gratuities or anything, is that right?

Mr. KENDALL. Not only did I not find any but as I have stated, there was sort of a brotherhood among the developers who were doing the preponderance of the work, and we all pretty much agreed that that's not going to work.

Senator DECONCINI. That's most encouraging.

What's your opinion as of today? Do you think that's probably still the case?

Mr. KENDALL. In my opinion, it is.

Senator DECONCINI. When an inspector came to inspect one of your projects, did you often realize he didn't have the capability and competence to do his job?

Mr. KENDALL. Absolutely.

Senator DECONCINI. Give me an example of how that came about.

Mr. KENDALL. Well, as I have said, the HUD inspectors generally had a fairly high degree of competence, but the inspectors of the Indian housing authorities—I had inspectors on the job where there was no way in the world they could have read and understood the plans and specifications. I had inspectors that didn't read or write.

Senator DECONCINI. These were Native Americans who worked for the Indian housing authorities?

Mr. **KENDALL.** That's correct. That wasn't always the case, but in many of the smaller housing authorities—you know, if the inspector can't read the plans, obviously he's not going to be able to interpret them properly.

Senator **DECONCINI.** On many occasions they had demonstrated no training or capability to do what they were supposed to be out there on the job doing?

Mr. **KENDALL.** That's correct.

Senator **DECONCINI.** Did you find that true on BIA or HUD housing inspectors?

Mr. **KENDALL.** Generally the inspectors for the Federal housing agencies did have a much higher degree of competence. It's my understanding that, because of budget restrictions and so forth, they had the right to inspect those units randomly or arbitrarily any time they chose, but generally in the areas that I worked in the HUD inspectors were only on the job for the final inspection. So if damage had been done, it was covered up by that time.

Senator **DECONCINI.** Now, Mr. Kendall, in the course of your testimony here, during the period of time that you were involved in giving gifts including cash, travel, and other types of gifts to Indian officials, have you estimated what you think the total value of that might be?

Mr. **KENDALL.** The total number of gifts?

Senator **DECONCINI.** Not the number, the amount. Do you have any estimation at all? Cars, whatever, tickets, cash?

Mr. **KENDALL.** I'd say somewhere in the area of a quarter of a million dollars.

Senator **DECONCINI.** A quarter of a million dollars over the period of time that you operated there?

Mr. **KENDALL.** Yes.

Senator **DECONCINI.** You in turn had a gross of somewhere around $30 million or more during that period?

Mr. **KENDALL.** That's right.

Senator **DECONCINI.** Thank you.

Mr. Kendall, I want to thank you for coming before the committee. I realize it is difficult to do so, but you are helpful to this investigation to try to see what corrective measures can be accomplished. I appreciate your candidness with us here today.

I have no further questions. Does counsel or Senator McCain have any other questions?

Mr. **BALLEN.** No, Mr. Chairman.

Senator **MCCAIN.** No, Mr. Chairman.

Senator **DECONCINI.** Thank you, Mr. Kendall.

Our next witness will be Donald Asbra, Chief, Contracting Division, Bureau of Indian Affairs.

[Witness sworn.]

STATEMENT OF DONALD ASBRA, CHIEF, CONTRACTING DIVISION, BUREAU OF INDIAN AFFAIRS

Senator **DECONCINI.** Would you please state your name and your residence?

Mr. **ASBRA.** My name is Donald F. Asbra, and I reside in Alexandria, VA.

Senator **DeConcini**. Counsel Brandolino will question the witness.

Mr. **Brandolino**. Thank you, Mr. Chairman.

Mr. Asbra, what is your current position with the Bureau of Indian Affairs?

Mr. **Asbra**. I'm the chief of the Division of Contracting and Grants Administration.

Mr. **Brandolino**. How long have you been employed with the Bureau of Indian Affairs?

Mr. **Asbra**. It will be 31 years this coming October.

Mr. **Brandolino**. What positions have you held with the Bureau in your years there?

Mr. **Asbra**. I originally went to work with the Bureau of Indian Affairs as a materials engineer in what was then the Gallup Area Office. I transferred from there and became the chief of the construction contracting section. From there I moved to Washington, DC as a general engineer dealing with construction contracting and went from there to chief of the Division of Contracting and Grants Administration, where I am today.

Mr. **Brandolino**. How long have you been the Chief of that division?

Mr. **Asbra**. Since 1972.

Mr. **Brandolino**. Have your duties involved setting the guidelines for the implementation of the BIA's Indian preference program?

Mr. **Asbra**. Yes, they have.

Mr. **Brandolino**. What is the statutory basis for that program?

Mr. **Asbra**. The statutory basis is the Act of June 25, 1910, which——

Mr. **Brandolino**. Is that known as the Buy Indian Act?

Mr. **Asbra**. That's right, commonly called the Buy Indian Act.

It might be a good idea for everybody just to hear what it says at this point in time.

It says, "So far as may be practicable, Indian labor shall be employed and purchases of the products of Indian industry may be made on the open market in the discretion of the Secretary of the Interior."

Mr. **Brandolino**. That's the extent of the act?

Mr. **Asbra**. That's the extent of the Buy Indian Act.

Mr. **Brandolino**. When was that enacted?

Mr. **Asbra**. It was enacted on June 25, 1910.

It is interesting to note, though, that the language of the current Buy Indian Act first occurred in the Indian Affairs Appropriations Act in 1886.

Mr. **Brandolino**. So it's fair to classify it as an archaic statute?

Mr. **Asbra**. We call them ancient acts, but that fits the description.

Mr. **Brandolino**. What contracts currently let by the BIA are subject to Indian preference?

Mr. **Asbra**. Our policy is to set aside all contracts for exclusive Indian bidding under the Buy Indian Act. However, we do have a couple of exceptions to that because of the *Glover* decision, that is that we cannot set aside any construction contracts other than for roads, and we cannot set aside any construction contracts, period, in the State of Oklahoma.

Mr. **Brandolino**. Could you explain how the BIA currently implements its Indian preference program?

Mr. **Asbra**. We advertise the contracts on a set-aside basis for Indian bidders. We award the contracts to the low Indian bidder who submits a responsive bid. Now, this is based on reasonable price and two bidders.

Mr. **Brandolino**. There have to be at least two qualified Indian-owned businesses?

Mr. **Asbra**. That's right. Now, if we do have only one, then we have to go through the non-competitive justification procedures.

Mr. **Brandolino**. And what is the extent of the BIA's enforcement of this Indian preference program? And by "enforcement" I mean deciding who is qualified and who is not.

Mr. **Asbra**. We have to rely on our contracting officers in terms of determining qualifications. When it comes to the enforcement of it, we have to rely at the operational level on our contracting officer's representatives.

Mr. **Brandolino**. So it's all done at the local level by the contracting officer?

Mr. **Asbra**. That's right.

Mr. **Brandolino**. How does a company become a qualified enterprise?

Mr. **Asbra**. Under our present guidelines we use a self-certification process. They certify that they are 51 percent Indian-owned. We're relying on the Indian community to file a protest if they feel that the company is not Indian-owned.

Mr. **Brandolino**. In your years at the BIA have you ever known the agency to decertify any business as purporting to be a qualified Indian-owned business but in fact is not?

Mr. **Asbra**. Since I've been there I can recall three times that we decertified companies as far as Buy Indian eligibility is concerned. That decertification took place only because we were fortunate enough to have an Inspector General's audit report to help us out.

Mr. **Brandolino**. Has the BIA ever enacted final regulations implementing the Buy Indian Act and Indian preference?

Mr. **Asbra**. No; we have not. We have been operating on nothing but internal procedures.

Mr. **Brandolino**. So you are operating totally on internal procedures and have been since the act was enacted in 1910, is that correct?

Mr. **Asbra**. Actually, there wasn't very much implementation of the act until 1963, when President Kennedy had an accelerated public works program. That was the first time there was any extensive use of the Buy Indian Act. Starting at that time we just used internal procedures, which varied over the course of time. Originally we dealt with firms which were "substantially Indian-owned;" we then went to 51 percent Indian-owned, from there to 100 percent, and back to 51 percent, where we are at today.

Mr. **Brandolino**. Has the unclear wording of the Buy Indian Act contributed to the fact that the BIA has not enacted regulations?

Mr. **Asbra**. Oh, there's no question about that. There have been a lot of disagreements. In fact, I think the *Glover* decision shows that at one point in time we felt we could do construction contracting under the act, but the Supreme Court said we couldn't. There's just been a general lack of understanding as to what Congress intended by the act. In fact, there is some language in the 1908 House report talking about the Buy Indian Act that observed that "the provision has been of convenience and value, especially where work was to be done on reservations remote from trade centers." That language in itself sort of leaves you up in the air as to the intent of the act. Was reservation development the idea? Was it economic development in the sense of Indian businesses, no matter where they are located? Was employment the primary concern?

So I think there has been a definite lack of understanding as to what the intent of the act was.

Mr. **Brandolino**. Has this lack of understanding contributed to an inconsistent implementation of Indian preference by the BIA over the years?

Mr. **Asbra**. I think that, coupled with—unfortunately, the BIA has had a lack of continuity of leadership over the years, with different Assistant Secretaries and Commissioners having different ideas as to the best way to implement it. You could couple that with the lack of understanding, and it has made for a difficult situation.

Mr. **Brandolino**. Are you aware that other Federal agencies implement their own Indian preference programs?

Mr. **Asbra**. Yes; I am.

Mr. **Brandolino**. And are you also aware that the statutory basis for some of these programs is different than the Buy Indian Act?

Mr. **Asbra**. Yes; basically, as far as I understand it, the other Federal agencies rely on Section 7(b) of Public Law 93-638, which is the Indian Self-Determination and Education Assistance Act, which deals with preference in subcontracting opportunities and employment opportunities on any Federal contracts that are for the benefit of Indians. That's positive language, and it says "to the maximum extent practicable" or "feasible."

Mr. **Brandolino**. I understand you've had some experience with implementing Public Law 93-638. Have you made some efforts to have other agencies enforce that Indian preference, that 7(b) preference?

Mr. **Asbra**. Yes; In 1975 I was one of the people that was put on the task force to develop the Public Law 93-638 regulations and go through the consultation process.

As part of that we took a look at 7(b) and saw that it said "all Federal contracts." Our first reaction was to contact the Department of Labor, thinking that maybe we could get some common rules through the affirmative action program. Labor advised us that they were in the affirmative action business, not the preference business, and they didn't think it would be proper.

We then went to the Office of Federal Procurement Policy with the hope that they would implement a common rule. There was some interest there and for several months it was pursued, but then they dropped it. So then we just resorted to writing letters to each of the departments in the Government saying, "Here's 7(b). We feel it's applicable to you. Please do something about it."

We didn't get much of a reaction there, so we satisfied ourselves with getting Department of the Interior regulations that implemented 7(b) so as to make it applicable to all of the Department of the Interior.

Mr. **Brandolino**. In your experience with the way other agencies have implemented their Indian preference programs under 7(b), has there been a difference in the way they implement their program to the way the BIA implements its program?

Mr. **Asbra**. Well, the BIA primarily relies on the discretionary authority of the Buy Indian Act, whereas the other Federal agencies rely on the rather positive authority that is contained in Section 7(b). So to that extent there is considerable difference. Up until this time we've dealt with 100 percent Indian-owned firms, whereas they use the 51 percent criteria, which is part of the definition in 7(b). It talks about Indian-owned economic enterprises as defined in the Indian Financing Act. If you go back to the Indian Financing Act, it says 51 percent.

Mr. **Brandolino**. So one of the differences between the way Indian preference has been implemented under the Buy Indian Act and under 7(b) has been the percentage of ownership needed to qualify? The BIA at one time used 100 percent as a standard and other agencies were using 51 percent?

Mr. **Asbra**. That's correct.

Mr. **Brandolino**. And did the BIA eventually change the standard to 51 percent?

Mr. **Asbra**. Last January, almost 1 year ago today, the standard was changed. It was changed to 51 percent Indian-owned.

Mr. **Brandolino**. How was that change made?

Mr. **Asbra**. It was done through publication of a notice in the Federal Register and changing our internal guidelines, which is the Bureau's manual.

Mr. **Brandolino**. Who was responsible for that?

Mr. **Asbra**. Assistant Secretary Swimmer made the decision.

Mr. **Brandolino**. What was his reason for changing the 100 percent to 51 percent?

Mr **Asbra**. As I understand it, his reasoning was that small businesses in general and minority businesses in particular have a difficult time attracting the kind of financing and expertise that they need to grow and, in fact, even get established. He felt that the only way to really make the money available that they needed to do this, as well as the expertise, was to give the people who were going to supply the funds and the expertise an opportunity to have a piece of the action. He felt that this would be much more effective.

Mr. **Brandolino**. Do you see any problems with the 51 percent standard?

Mr. **Asbra**. Well, I personally have a problem with it simply because of my past experience in wrestling with some of the "front" type organizations that I've encountered over the years. Philosophically I don't have any problem with it.

Mr. **Brandolino**. Do you see any problems with using percentage of ownership as the sole standard of whether a business qualified?

Mr. **Asbra**. If it was only the percentage of ownership I would have a definite problem, but we have tried to put into the rules active management as well as the percentage of ownership, which does help.

Mr. **Brandolino**. Do you believe we need a single piece of legislation which would apply Indian preference—would make clear what the policy behind Indian preference is, make clear what contracts it applies to, make clear what agencies and tribes it applies to, and would be responsible for setting one set of guidelines which all agencies and tribes would use? Do you think that would be helpful?

Mr. **Asbra**. I would definitely like to see some modern legislation that tells us what Congress would like us to do with the Indian preference statutes.

There is a great deal of confusion in this area, and you can even look at the courts' decisions in this respect. When the *Glover* decision came down from the Circuit Court in Oklahoma, they said "no construction under the Buy Indian Act." It went up to the Tenth Circuit Court of Appeals in Denver, and you had a dissenting opinion in that one. One of the reasons for the dissent was that the majority decision said that it took a real stretch of the imagination to even begin to imagine that construction should be deemed to be a product of Indian industry and labor in accordance with the act.

The dissenting judge made the point that you had to look at law as something that evolved over a period of time to fit the circumstances of the present day, and that to in essence say to Indian people, "This doesn't fit," you'd be putting them back into—I think he used the phrase, "the beads and blanket era."

So we do need legislation and we do need something that is clear, concise, and applicable to all agencies.

Mr. **Brandolino**. Just to clarify, the *Glover* decision was a decision which—could you explain that a little?

Mr. **Asbra**. OK. The *Glover* decision is a case where the Glover Construction Company sued the U.S. Government on the basis that construction was not appropriate under the Buy Indian Act. The basis for this was under the exceptions to the Federal Property Administrative Services Act, which permit negotiations, and there are 15 exceptions, one of which is "otherwise authorized by law."

But when you further read the Federal Property Administrative Services Act it says you can't use the "otherwise authorized by law" authority to negotiate construction contracts. As a result of that, based on the Federal Property Administrative Services Act, exception is to formal advertising. They said we could not do construction.

Mr. **Brandolino**. So the rule that came from that decision was that the Buy Indian Act cannot be applied to construction?

Mr. **Asbra**. That's right, and this was upheld by the Supreme Court. We did get relief when the Federal Highway Act was passed. There was language put in there that allowed us to do highway construction under the Buy Indian Act.

Mr. **Brandolino**. Do you think this decision has been in part a result from the lack of clear statement of what the Buy Indian Act was intended to do?

Mr. **Asbra**. There's no question about that.

Mr. **Brandolino**. Thank you, Mr. Asbra.

Mr. **Sollers**. Mr. Chairman, if I might just ask a couple questions?

Senator DECONCINI. Mr. Sollers.

Mr. SOLLERS. Thank you, Mr. Chairman.

Mr. Asbra, you've mentioned the concept of "fronting." Is fronting a problem, in your view, under the Buy Indian Act?

Mr. ASBRA. Potentially, I think it is. The problem that we have in the Bureau of Indian Affairs is that we don't really have a mechanism that's readily available to us to determine whether we have front organizations or not. I read the Washington Post, like I guess everybody else does, and I read about the comments that were made about Blaze Construction Company—I guess the owner made them in the paper—and I assume they were relatively accurate since the newspaper told us all about it.

It is interesting to note that when Blaze first bid on one of our jobs in Phoenix and came out the low bidder, I had a very suspicious contracting officer down there. He sent a contract specialist and was able to arrange for a member of the Inspector General's office in Sacramento to go with him, and they did a thorough investigation of all the paperwork and the offices and everything else of Blaze Construction. They came back and said, "It looks like we have an up front organization here. He's not a front"—as far as the paper was concerned. They still had a gut reaction that there was something wrong but they didn't know what the heck it was. However, when the information was presented to the inspection side of the house, they said, "You don't have enough to go into a full-fledged investigation."

So I think it is a problem but I don't think we have the capacity within the Bureau to address the problem.

Mr. SOLLERS. So you, as chief contracting officer at the Bureau, have a lack of data as to whether or not fronts are pervasive on the reservations?

Mr. ASBRA. Oh, there's no question about that. We don't have that kind of information available.

Mr. SOLLERS. I think you just testified that since you've been at the Bureau there have been three decertifications, is that right?

Mr. ASBRA. That's right.

Mr. SOLLERS. Were those three decertifications because the companies were fronts?

Mr. ASBRA. Let me think, now. Two were because of front organizations and the other one was because of a controversy over the Indian ancestry of the person involved, and we finally resolved that. We determined that he was not an Indian and he was decertified because of that.

Mr. SOLLERS. So in reality there have been two decertifications because of fronting, is that correct?

Mr. ASBRA. That's correct.

Mr. SOLLERS. I think you testified that that was only because the Inspector General's office had uncovered those frauds pursuant to audit, is that right?

Mr. ASBRA. That's right.

Mr. SOLLERS. Now, does BIA have its own sufficient enforcement capacity to oversee Indian preference or Buy Indian?

Mr. ASBRA. I don't feel that we do. We have to rely on our contracting officers, and our contracting officers representatives, who basically are program people. In that respect you could call them project inspector types. As a consequence, I don't believe we have the expertise to do it.

Mr. SOLLERS. Furthermore, assuming you uncovered some information, is it a difficult process for you to decertify a contractor?

Mr. ASBRA. They are entitled to all the appeal rights that come down by virtue of 25 CFR, the administrative appeals, and it does take a while to get the job done.

Mr. SOLLERS. Suffice it to say, it's a long administrative process. Is that correct?

Mr. ASBRA. It certainly is.

Mr. SOLLERS. No further questions. Thank you.

Senator DECONCINI. Mr. Asbra, when you talk about decertifying, is a contractor certified only one time? Does he submit application for certification?

Mr. ASBRA. Under our current rules, on the invitation for bids they have to certify that they are an eligible Indian concern. So it's an ongoing thing in that respect, with the caveat in there that if they give us false information they are liable under 18 U.S.C. 1001.

Senator DECONCINI. Is that an affidavit performed under oath?

Mr. ASBRA. Yes; it is.

Senator DECONCINI. Now, the first certification, if I'm going to want to get a BIA contract—is that a self-certification also?

Mr. ASBRA. It is now, sir. Originally when we were working under the 100-percent procedures we required all the Indian contractors that wanted it to be certified as Indian-owned and eligible for the Buy Indian Act.

Senator DECONCINI. BIA, in essence, is out of the certification business and really relying like the IRS does, that the taxpayer or the contractor here is going to tell the truth?

Mr. ASBRA. That's right, sir.

Senator DECONCINI. And is that derived out of the fact that you cannot administratively review and process and investigate these?

Mr. ASBRA. When we went to 51 percent, it was our judgment that there was no way in the world that we were going to be able to do a thorough investigation of each one of them. We hoped to rely on the Indian business community, in essence, to police itself, similar to what the Small Business Administration does. They have to check that block that says "Yes, I am a small business," and they have to check a block that says, "Yes, I'm an Indian." If the rest of the Indians don't agree, they can protest and we can go through it.

Senator DECONCINI. In your opinion is that a prudent operation?

Mr. ASBRA. I don't think it's going to be sufficient, but I think that under the circumstances we have very little choice.

Senator DECONCINI. When the change was made to 51 percent, no additional resources were set aside or allocated for certification? In fact, what you're telling us is that instead of doing that you took resources away from certification and did less by instituting a self-certification?

Mr. ASBRA. In essence that's correct, sir.

Mr. SOLLERS. Administratively the BIA Director changed it from 100 percent to 51 percent?

Mr. ASBRA. That's correct.

Senator DECONCINI. Under what authority did he do that?

Mr. ASBRA. The act is discretionary, to start with. The Bureau has never promulgated regulations in the normal, accepted sense of the word. Everything has been done through——

Senator DECONCINI. Do you know why that is, that the Bureau has never promulgated regulations?

Mr. ASBRA. Well, I've been involved in it since about 1975, trying to get regulations written, and it has been a nightmare in the sense that we get something underway and then something changes—either the Administration changes or the interpretation changes or something like that——

Senator DECONCINI. Do you get proposed regulations to your superiors or to the BIA Director?

Mr. ASBRA. They've gone through the mill I don't know how many times.

Senator DECONCINI. And have never been adopted or promulgated?

Mr. ASBRA. No, sir; they are now sitting in the Solicitor's Office—our latest final version is now in the Solicitor's Office again for one final review with the hopes that it will be published—I'm just going to use the word "shortly."

Senator DECONCINI. When was it sent to the Solicitor's Office?

Mr. ASBRA. Well, this time around it's only been over there a couple of weeks. I won't talk about some of the other time frames.

Senator DECONCINI. That's a sticky problem when you can't get any regulations promulgated.

How much discretion does the Director have? Could he make it 1 percent Indian ownership?

Mr. ASBRA. Well, the act says "so far as may be practicable and at the discretion of the Secretary." And that's it.

Senator DECONCINI. That's it.

Mr. ASBRA. It's an interesting one-liner.

Senator DECONCINI. Now, when BIA inspectors are sent out on the job—I presume that's what you oversee as well?

Mr. ASBRA. No, sir; I have no authority over those.

Senator DECONCINI. Where are those, in the regions?

Mr. ASBRA. Those are in our area offices.

Senator DECONCINI. Your area offices?

Mr. ASBRA. The Bureau of Indian Affairs is set up so that line authority is—we're staff—line authority is from the Assistant Secretary to the Area Directors and to the Superintendents. The contracting officers at the area level are staff, as I am. The contracting officers sign the contracts and then they appoint contracting officer's representatives from the program staff to monitor the progress of the contract.

Mr. SOLLERS. So you don't have anything to do with those inspectors that go out?

Mr. ASBRA. No, sir; we don't.

Senator DECONCINI. What if an inspector goes out and reports something very flagrant with the job. Would that come back to you?

Mr. ASBRA. If the contracting officer can't settle it on his own, we encourage them—if they can't get it taken care of, they are supposed to come to us, but that's an informal arrangement, Senator.

Senator DeConcini. So you don't have any idea what the training or criteria is for an inspector in the field?

Mr. Asbra. Most of the inspection work that is done in the field, the basis of it is their experience in the program. For instance, on a road-building job, are they building that road the way that road is supposed to be built? Is the gradation of the materials correct? Is the compaction of the soil correct? Have all the different physical tests been performed that go into determining whether that road meets the contract plans and specifications? That's where their expertise is.

Senator DeConcini. Now, on the area that you have jurisdiction over, the certification of the contractor, that comes to you through the contracting officer, if I understand your position correctly?

Mr. Asbra. Yes, sir.

Senator DeConcini. Now, what inspection do you do for fronts?

Mr. Asbra. We don't have any capacity to inspect, sir. We just——

Senator DeConcini. You don't have any capacity?

Mr. Asbra. No; we don't. If we have sufficient information we go to the Inspector General's office and ask them for assistance.

Senator DeConcini. You turn that over to them?

Mr. Asbra. That's right.

Senator DeConcini. And have you done that?

Mr. Asbra. Yes; we have.

Senator DeConcini. How many times?

Mr. Asbra. Well, two of the times that Mr. Sollers mentioned, then there were two other times when we had them go in and do what we call a "pre-award audit."

Senator DeConcini. Three times since you've been there, since 1975?

Mr. Asbra. That's right, sir.

Senator DeConcini. That's not very many.

Mr. Asbra. No, it isn't.

Senator DeConcini. Is it because you haven't had complaints or haven't had any evidence, or what?

Mr. Asbra. The basic reason is that nobody has sent in any complaints to us.

Senator DeConcini. I see. And you have no capacity within your own organization to see them, really, from the field or anyplace else?

Mr. Asbra. No, we don't.

Senator DeConcini. How would someone file a complaint of a front?

Mr. Asbra. At this point in time they would file it with the contracting officer, and the contracting officer would make the determination. If the contracting officer's determination is such that the complainant does not agree with that determination, they have the right to appeal that to the Director of Administration.

Senator DeConcini. Where is the contracting officer?

Mr. Asbra. The contracting officer is at the area level, sir.

Senator DeConcini. The area level?

Mr. Asbra. Yes.

Senator DeConcini. So he could receive them and dismiss them and you would never know about it back here, is that correct?

Mr. **Asbra**. Unless the person who filed the complaint formally appealed that decision.

Senator **DeConcini**. Asked for an appeal?

Mr. **Asbra**. That's right.

Senator **DeConcini**. Mr. Asbra, in the course of working the many years you have for the BIA, have there ever been discussions or internal directions to provide suggestions as to changing the legislation?

Mr. **Asbra**. Oh, yes, sir. In fact, if I'm not mistaken, we proposed some legislation last year as part of the process of amending Public Law 93-638. If I'm not mistaken, we proposed something like a Section 7(c) to be included in there.

Senator **DeConcini**. To make it part of the Indian set-aside act?

Mr. **Asbra**. Yes, sir; what it essentially did, though—and I have to admit that it did not go into a great lot of detail—the central idea behind it was to nullify the *Glover* decision so that we could start doing all kinds of construction under Public Law 93-638 rather than just road construction.

Senator **DeConcini**. Now, if a contractor fills out the forms, says that he is qualified, 51 percent of the company is owned by a native American, signs it under oath, comes to you, that's it?

Mr. **Asbra**. That's right, sir.

Senator **DeConcini**. There's no policing whatsoever?

Mr. **Asbra**. No, sir.

Senator **DeConcini**. Thank you.

I have no further questions. Does counsel have any other questions?

[No response.]

Senator **DeConcini**. Mr. Asbra, thank you for your testimony and your assistance in helping us to understand the procedures that the BIA goes through. We appreciate the time that you've put in with our staff.

Mr. **Asbra**. Thank you, sir.

Senator **DeConcini**. The special committee will recess until 2 p.m. this afternoon. We will go into executive session at that time to hear some testimony regarding the Small Business Administration. I think that should take less than 1 hour. I just want to advise the public that we will go through the procedure of executive session at that time, and we will reconvene in open session at 3 p.m. The committee will stand in recess.

[Whereupon, at 11:45 a.m., the committee was recessed, to reconvene in executive session at 2 p.m. this same day.]

AFTERNOON SESSION

Senator **DeConcini**. The Special Committee on Investigations will resume its open session.

Our next witness is Steven N. Marica, who is Assistant Inspector General for Investigations of the Small Business Administration. Mr. Klingenstein will conduct the examination.

[Witness sworn.]

STATEMENT OF STEVEN N. MARICA, ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, SMALL BUSINESS ADMINISTRATION

Mr. **Klingenstein**. How many investigations of Indian firms are currently ongoing?

Mr. **Marica**. Approximately 53.

Mr. **Klingenstein**. Has that number increased or decreased since you joined the office?

Mr. **Marica**. It's increased.

Mr. **Klingenstein**. What had it been in prior years?

Mr. **Marica**. My first year here was 1986. We had 16 investigations. In 1987, that figure rose to 32, and in 1988 we had 44. We currently have 53.

Mr. **Klingenstein**. To what do you attribute the increase in investigations?

Mr. **Marica**. I believe the increase is attributed to a number of factors. One is the publicity surrounding some 8(a) investigations and subsequent increased awareness on the part of prosecuting attorneys' offices of the potential in this area. Also, a heightened public awareness that these types of things do get investigated which has also resulted in more referrals regarding 8(a) matters.

Mr. **Klingenstein**. Roughly how many 8(a) firms participate in the program.

Mr. **Marica**. Approximately 3,000.

Mr. **Klingenstein**. Of those, how many are Indian firms?

Mr. **Marica**. Approximately 202.

Mr. **Klingenstein**. So about 7 percent of the total pool is comprised of Indian firms?

Mr. **Marica**. Yes, sir.

Mr. **Klingenstein**. Did you have occasion to investigate any 8(a) firms that qualified into the program through their Indian affiliation?

Mr. **Marica**. In the last 5 years I think we've had allegations on six Indian firms.

Mr. **Klingenstein**. What is the total value of contracts that are awarded to the Indian 8(a) firms?

Mr. **Marica**. According to the records of the Minority Small Business Division at SBA, the total amount of contracts given to Indian firms from 1985 to 1988 is 1,537 contracts. The dollar amount is approximately $1 billion.

Mr. **Klingenstein**. Are there any unique problems that your office faces in connection with the investigation of Indian 8(a) firms?

Mr. **Marica**. No unique problems, no.

Mr. **Klingenstein**. Have you ever run across a question concerning a challenge to the authenticity of any Indian-affiliated company enrolled in the program?

Mr. **Marica**. Yes; we had an incident last year wherein a complaint was lodged against an individual for allegedly falsifying his status as a Cherokee Indian. We began an investigation by contacting the Department of the Interior, Office of the Inspector General, and was told that the certification process regarding the Indians basically rested within the nations themselves.

Mr. **Klingenstein**. So if the particular Indian tribe accepts that firm's minority as an Indian, then your office is without authority or jurisdiction to challenge it?

Mr. **Marica**. Yes, sir, that's my understanding.

Mr. **Klingenstein**. Has your office had any involvement with the firm Kinross Manufacturing Corporation?

Mr. **Marica**. Yes; we have.

Mr. **Klingenstein**. Can you describe your involvement?

Mr. **Marica**. At this point our involvement is participating in a joint investigation with the United States attorney's office in Grand Rapids and the FBI.

Mr. **Klingenstein**. Is the FBI the lead agency in the investigation?

Mr. **Marica**. They were involved in it first, yes, sir.

Mr. **Klingenstein**. Are you able to tell us what the principal focus of the investigation is?

Mr. **Marica**. At this point I'm not; the matter is entirely before the Grand Jury.

Mr. **Klingenstein**. Has a list of targets been identified by the investigators?

Mr. **Marica**. The investigators are looking at several areas. There is focus to the investigation obviously, but the list of targets varies just as with any investigation.

Mr. **Klingenstein**. Can you tell us whether those under investigation include Government employees?

Mr. **Marica**. I cannot say.

Mr. **Klingenstein**. Mr. Marica, have you listed in your files an amount of potential loss to the Government in connection with Kinross?

Mr. **Marica**. Yes, I have.

Mr. **Klingenstein**. What is that amount?

Mr. **Marica**. That amount is approximately $18 million.

Mr. **Klingenstein**. And how is that determined?

Mr. **Marica**. Our process in regard to that is—I'll have to speak hypothetically and not directly to this investigations—if an allegation is lodged against a firm, the first step is to determine the amount of exposure the Government has vis-a-vis the contracts or loans available for prosecuting purposes or the amount of money that a firm would have illegally enriched itself. Basically what we look at originally is the total amount of money that has been let.

Mr. **Klingenstein**. Can you tell us how your office became involved in the Kinross matter?

Mr. **Marica**. Yes; this matter was first brought to our attention by our Office of Audit in conjunction with an audit that they were doing on Kinross Manufacturing. There was an allegation brought to our attention early in 1987, at which point we decided to let the auditors continue their work as the information they were getting was sketchy.

The auditors submitted to us a draft report in July 1987. It was a draft; it had a lot of raw data in it, a lot of material that had not been verified through either audit work papers or active investigation. However, it caused us to open an investigation and contact the FBI, who was looking at Kinross on another matter.

Mr. **Klingenstein**. When did the first complaint regarding Kinross come to your attention?

Mr. **Marica**. I would have to say the first complaint came around the summer of 1987.

Mr. **Klingenstein**. And you opened your investigation when?

Mr. **Marica**. Approximately July 1987.

Mr. **Klingenstein**. You mentioned during the course of your investigation you obtained access to a draft audit prepared by the Audit Section of the Inspector General's Office; is that correct?

Mr. **Marica**. Yes, sir.

Mr. **Klingenstein**. Did that audit contain allegations of control by outside, nondisadvantaged investors of the company?

Mr. **Marica**. Let me clarify. In dealing with grand jury information, we are bound by the laws regarding grand jury secrecy. The audit report did contain that information as well as other information relating to allegations against KMC.

My only caution here is that there be no parallel drawn between what might or may not have been in the audit report and matters before the grand jury.

Mr. **Klingenstein**. Well taken, but that audit report was used by your office in connection with its investigation; correct?

Mr. **Marica**. It affords us leads, yes.

Mr. **Klingenstein**. During the course of your investigation you gained access to that audit report; correct?

Mr. **Marica**. The Audit Division referred that to my office, yes, sir.

Mr. **Klingenstein**. And the audit contained allegations concerning, among other things, the degree of outside control by a nondisadvantaged investor?

Mr. **Marica**. Yes.

Mr. **Klingenstein**. Did it also contain allegations of false statements that were made to the Government?

Mr. **Marica**. Yes.

Mr. **Klingenstein**. Did it also contain allegations of irregularities or abuse in connection with the application process?

Mr. **Marica**. In general, yes. With no more specifics than that, yes.

Mr. **Klingenstein**. Can you tell us what your office did in response to the allegations contained in the draft audit?

Mr. **Marica**. As a result of that, we opened our own investigation. However, we were also aware that the FBI was looking at certain allegations involved with Kinross, so we contacted the FBI and the U.S. attorney's office in Grand Rapids and joined the investigation at that point.

Mr. **Klingenstein**. What's the nature of the investigation? What's the status presently?

Mr. **Marica**. The status? It's an active investigation.

Mr. **Klingenstein**. Mr. Marica, let me ask you some general questions about what your office is doing in connection with the 8(a) program. Do you, on the basis of the investigations that you've undertaken, do you think there's a significant problem with fronts among 8(a) applications in the program?

Mr. **Marica**. Within the context of the 8(a) program, allegations that we investigate, a substantial portion involve the use of fronts.

Mr. **Klingenstein**. Are there problems that you've identified on the basis of your investigations that are unique to the 8(a) program?

Mr. **Marica**. Yes, sir; the 8(a) program offers certain incentives that are not available through other contracting within the Government. These incentives include no competition bidding or sole source contracting. There are one or two types of financial assistance that are available to 8(a) participants that are not available to other contractors within the Government. Business development expenses and advanced payments are two such examples. So the incentive is there.

In a context of the types of fraud that we run into, fronts are obviously one of the problems that we do have. Misuse——

Mr. **Klingenstein**. Are there other—I'm sorry.

Mr. **Marica**. Misuse of BDE and advanced payments, for example, is another area of concern.

Mr. **Klingenstein**. What's BDE?

Mr. **Marica**. Business Development Expenses are expenses or funds that will be given to a company in order to purchase capital equipment so that company can complete a contract.

Mr. **Klingenstein**. Have you identified any particular problems with Indian 8(a) applicants?

Mr. **Marica**. No, sir; we have not.

Mr. **Klingenstein**. Have you identified any problem, where the problems do exist, with the attitude of SBA employees that may allow these abuses to take place?

Mr. **Marica**. One of the problems that we have in investigating 8(a) situations, 8(a) and fraud, for example, is a perception on the part of the public that it's less than a straightforward program.

There are a lot of reasons for this perception. Much of it has to do with the publicity surrounding investigations such as Wedtech and other 8(a) matters that have received great media attention.

In an effort to get the agency to more or less clean up this public perception, the IG's office has embarked on a three-prong program. The first aspect is to provide deterrence through the prosecution of individuals involved in criminal activity and the subsequent publicity that goes along with that.

Second we have embarked on an education program to try to reach out to the employees of the SBA and the managers to talk about public corruption, bribery, conflict of interest, and these types of things that they can be susceptible to in their activities working for the SBA.

The third is trying to deal with managers of the agency in order to instill a sense of fiscal responsibility, as opposed to putting money out on the street haphazardly. We hope to stress the point that the agency managers should insist that the tight guidelines which are in effect in the SBA regulations be met in order to meet the intent of Congress regarding the SBA programs.

Mr. **Klingenstein**. Have you found that the attitudes of SBA employees ever impair your ability to take action against abusers of the system?

Mr. **Marica**. I don't want to indict the entire population of SBA with that. We have run into individuals on cases, for example, that have cost us prosecutions because they have overstepped their discretion or their judgment in the use of allowing loans, for example, or allowing certifications. We have recorded several instances where employees have stated in front of prosecutors or in testimony in trial that even though the person lied on an application, for example, they would have approved the loan anyway. This, of course, hinders our ability to deter through prosecution and it also injures the reputation of the agency because it represents an agency where regulations don't mean anything. That's one of the things we're trying to address and have been addressing with some of the managers recently.

Mr. KLINGENSTEIN. What form does political corruption in the program usually take in your experience?

Mr. MARICA. In 8(a) cases, primarily bribery, I'll speak to the cases in the public record where members of Congress have been indicted for accepting bribes in connection with influence.

Mr. KLINGENSTEIN. In your experience when any agency employee accepts payments, what form do they take? Are they small perks or——

Mr. MARICA. In my experience both here and with the IRS, it seems to follow a pattern. If an individual sets out to corrupt a Government employee, it's usually done in small, nominal gifts—lunches, dinners, weekends. It seems to be an escalating process, almost as if it's a testing process to see how much this employee can be trusted or if enough can be gathered to almost force the employee to take more.

I've very rarely come across individuals that have been offered great sums of money right off the bat. One of our education efforts is aimed at teaching employees how to recognize and report such offers.

In fact, last summer we had a case in Los Angeles where an employee did report one and we wound up arresting and convicting two individuals for bribery.

Mr. KLINGENSTEIN. You mentioned that deterrence was one prong of your attack.

Mr. MARICA. Yes.

Mr. KLINGENSTEIN. Do you think the Inspector General's actions in this area have effectively helped to deter abuses in the program?

Mr. MARICA. I think that's something only time is going to tell.

Mr. KLINGENSTEIN. Do you believe that you are currently investigating a very substantial portion of the abuses in the 8(a) program?

Mr. MARICA. I have no way of knowing.

Mr. KLINGENSTEIN. Mr. Marica, I have no further questions.

Senator DECONCINI. Mr. Marica, in your experience where you end up with findings of substantial payoffs, is there a pattern that this has started through smaller things—dinners, football tickets, cups of coffee, or anything like that? Can you give us a little background?

Mr. MARICA. Not so much at this agency because we haven't gone into the depth, but at IRS, for example, a few years ago there was a scandal involving Gulf Oil which was highly publicized. That pattern seemed to be prevalent in that situation.

In individual cases of bribery that we have prosecuted employees for accepting bribes, there seems to be a pattern of fraternization with contractors or other recipients of Government assistance or contracting officials.

Senator DeConcini. You, I believe, indicated some testimony here that you were trying to educate the employees to enforce the rules and to recognize that their failure to do so may have an adverse effect on the SBA's ability to rid the program of illegitimate companies.

Mr. Marica. Yes, sir.

Senator DeConcini. Is that correct?

Mr. Marica. Yes, sir.

Senator DeConcini. Can you describe, what efforts did you do? Did you write a memorandum or did you teach classes, or what did you do?

Mr. Marica. There is a class right now that the agency is putting on called Professional Ethics and Judgment. It's aimed at the employee at the lower levels and first- and second-line supervisors.

Senator DeConcini. Did you institute that program or——

Mr. Marica. No, sir; that was instituted by the Office of Administration.

Senator DeConcini. It's ongoing now?

Mr. Marica. It's an ongoing—they have had the first class.

In connection with that, we requested and were given a 3-hour time slot in order to put from the IG perspective the appearances, how corruption takes its form, the types of offers, and how to handle those situations.

Senator DeConcini. Now your IG reports are all published; is that right?

Mr. Marica. Yes, sir; I'm sorry, the semiannual reports are published.

Senator DeConcini. The semiannual reports?

Mr. Marica. Yes; the investigative reports are not.

Senator DeConcini. They are not published?

Mr. Marica. No, sir.

Senator DeConcini. Do you think greater publication or exposure would have any deterrent?

Mr. Marica. No, sir; I think that you would—in situations where the investigations do not prove the allegations, that would serve no purpose whatsoever except in some instances to possibly reveal some of the investigative techniques. Successful Prosecutions are publicized through press releases by U.S. attorneys.

Senator DeConcini. Your testimony is that in your best judgment, based on your experience, there is—would you call it a significant, substantial, or what kind of a problem with fronts among 8(a) applicants in general?

Mr. Marica. Within the context of the investigations that we see——

Senator DeConcini. That you do.

Mr. Marica [continuing]. One of the major problems that we have is the use of fronts, yes.

Senator DeConcini. That's a major problem?

Mr. Marica. Yes, sir; I would say roughly, without—we're probably talking maybe, of the criminal complaints lodged against 8(a) firms, fronting and that type of thing probably runs 40 to 50 percent——

Senator DeConcini. About 40 to 50 percent?

Mr. Marica. Yes, sir; that's just an opinion.

Senator DeConcini. I understand. Just your opinion based on the investigations you've been involved in?

Mr. Marica. Yes.

Senator DeConcini. Without any statistical assurance of that.

In your own view, do you have any opinion as to what could be done to correct that? Do we need more enforcement, more investigation, and that sort of thing early on, or have you given some thought to that?

Mr. Marica. Enforcement is a good deterrent if prosecutions are carried through and the public is made aware that it's not a good idea to venture into this area, certainly. We do everything we can to try to prosecute those more heinous situations that will get that necessary publicity.

Beyond that, the education process, making SBA employees stick to their rules, making it harder for someone to breach the system that's there—the SOPs are very restrictive; they're very tight, and I think your staff would agree from looking through them that the regulations and the criteria that are laid out within the guidelines are adequate at least; in fact, probably more than adequate because they spell out certain codes and percentages, dollar values, et cetera.

The problem is when people use their own judgment or discretion, No. 1, that injures the reputation of the agency because they're not known as a "by the book." The second thing is it allows for criminal activity to take place without much accountability on the part of the individuals that are engaging in that activity. This is where we're pointing our efforts at the higher management level, the regional administrators and individuals such as this, to make program managers and program employees accountable for their actions and take positive efforts in the integrity area.

There are all kinds of laws and regulations: OMB Circular 123, for example, in the financial integrity and responsibility provides that employees be on the alert for weaknesses in the system that can be breached. What we're trying to do is make managers attack that positively rather than passively.

Senator DeConcini. Thank you. The committee has no more questions. We thank you for your time and your assistance with our committee staff over the many, many weeks that you've helped us here. We appreciate it.

We'll now hear again from Special Agent Richard Elroy.

Thank you, gentlemen.

For the record, Mr. Elroy, we'll remind you that you're still under oath of the committee.

Mr. Elroy. Yes, sir.

Senator DeConcini. Mr. Klingenstein will continue the examination.

STATEMENT OF RICHARD JAMES ELROY, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION

Mr. **Klingenstein**. Mr. Elroy, you've testified previously before the committee as the FBI agent detailed to the committee; is that right?

Mr. **Elroy**. Yes, sir.

Mr. **Klingenstein**. Have you during the course of the investigation had occasion, Mr. Elroy, to investigate HUD Indian housing programs?

Mr. **Elroy**. Yes.

Mr. **Klingenstein**. And could you report on your findings to date to the extent they can be reported?

Mr. **Elroy**. Yes; we came across one incident.

Mr. **Ballen**. Mr. Elroy, these are findings based upon congressional investigations; is that true, and not anything that is undertaken by the FBI or other law enforcement agencies?

Mr. **Elroy**. That's correct.

Mr. **Ballen**. Thank you, sir.

Mr. **Elroy**. The exception is there is some GAO information that was referred to the committee, but there's no FBI or Justice Department information here.

Mr. **Ballen**. OK.

Mr. **Elroy**. This testimony—I'll keep this brief—this testimony has to do with in some ways dovetailing into the previous witness in that we're talking a little bit about Kinross, which is an ongoing investigation as was described by the previous witness.

Mr. **Klingenstein**. What is the link to the Kinross matter?

Mr. **Elroy**. One of the principal players is a Jerry E. Blanchard. Mr. Blanchard was eventually the president of Kinross. He was at one time a vice president for Gnau, Carter, and Jacobsen, a Washington, DC firm.

Mr. Blanchard approached a number of Indian housing authorities, including one out of Minnesota, the Fond du Lac in Minnesota, and informed them that he could guarantee that these housing authorities would receive HUD housing projects if they hired Cooley Construction Company to do the work.

He touted a number of Washington officials and claimed that they had influence in Washington, and he mentioned the Attorney General and the Director of the CIA and the Secretary at HUD as some of the people that they had considerable influence with.

Later, Mr. John Gnau from Gnau, Carter & Jacobsen, met with the Secretary at HUD and, subsequent to that, 400 units were set aside. Mr. Blanchard alleged that these setaside units were at his disposal in dealing with these housing authorities and that the housing authorities would be guaranteed to get the units provided they use Cooley Construction Company.

The connection between Gnau, Carter & Jacobsen, and Cooley Construction Company was that Cooley Construction Company paid Gnau, Carter, Jacobsen $100,000 up front with the promise of $50,000 to come if they could deliver these units and if Cooley got the work.

Now a woman that was in charge of the Fond du Lac Indian Housing Authority directed a letter to HUD's Region 5 office complaining that, in her opinion, this was a violation of the law for someone to tout these housing projects.

Mr. **Klingenstein**. Tout that they could guarantee the housing projects from HUD?

Mr. **Elroy**. Yes.

Mr. **Klingenstein**. And what was HUD's response to the letter?

Mr. **Elroy**. They never responded in writing, but she did receive a phone call from a G. Leon Jacobs of HUD's Region 5 who—now this is her version of this story—said that she was correct, that would be a violation, but he went on to say that Gnau, Carter, Jacobsen was a good firm and that she should try to utilize them.

Mr. **Klingenstein**. Did her housing authority actually obtain housing units through Gnau Carter?

Mr. **Elroy**. No; they did not.

Mr. **Klingenstein**. Do you know whether any other housing authority ever obtained units through Gnau Carter?

Mr. **Elroy**. I believe there was one, but they never produced the units that they said they would, and I think part of the problem may have been this Minnie Porter from Fond du Lac blowing a whistle and causing a lot of stir about this being a violation.

Mr. **Klingenstein**. Have you been able to determine whether there were any payments made by Gnau Carter to any Government employee or representative?

Mr. **Elroy**. No; we have no evidence of that.

Mr. **Klingenstein**. What's the current status of this investigation?

Mr. **Elroy**. With our committee?

Mr. **Klingenstein**. Yes.

Mr. **Elroy**. We've reached a dead end. I think as we heard from the previous witness, there is apparently an investigation underway, a joint investigation, and the fruits of that will, of course, come out down the line.

Mr. **Klingenstein**. You have other cases that you're investigating in the housing area that are not ready to be reported at this time; is that correct?

Mr. **Elroy**. That's right.

Mr. **Klingenstein**. OK. I have no further questions.

Senator **DeConcini**. Thank you, Mr. Elroy. We have no further questions. We appreciate your testimony.

Mr. **Ballen**. Mr. Chairman, I move that a summary of the Executive Session testimony of Mr. Ramirez be placed in the record.

Senator **DeConcini**. Without objection, the record will take the summary of the statement as soon as it's completed and will be available then for the audience.

Mr. **Ballen**. Mr. Chairman, it's understood that the summary does not include all portions of the testimony and some which was sensitive is not available.

Senator **DeConcini**. That's correct.

[Material to be supplied appears in appendix.]

Senator **DeConcini**. The Special Committee will stand in recess until 10 a.m. tomorrow morning.

[Whereupon, at 5:50 p.m., the proceedings recessed, to reconvene the following day, Thursday, February 2, 1989, at 10 a.m.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA

For the last eight months, the Senate Special Committee on Investigations has been conducting a comprehensive investigation into all aspects of the federal government's relationship with American Indians. The investigation was prompted, in large part, by a series of articles which appeared in the Arizona Republic newspaper, alleging widespread fraud, mismanagement and corruption.

Thanks to the leadership displayed by Co-Chairman McCain, our Committee has conducted this investigation in an entirely bipartisan fashion. Last spring Co-Chairman McCain and I assembled one, unified, bipartisan staff -- including natural resource specialists, an accountant, several attorneys, and professional investigators. The Committee staff began by reviewing Congressional reports, Interior Department audits, and investigations that evaluated the various Indian programs under review. We also began to interview, on a confidential basis, federal employees, tribal members and others in the private sector who deal with Indian tribes. Indeed, over the course of the last eight months, our staff conducted over a thousand interviews, by telephone and in person. The staff received briefings and documents from every federal agency that administers Indian programs.

The Committee also sought help and guidance from the tribes. When we first got underway, we wrote the tribes to explain the Committee's function and to solicit views on problems confronting the Indian community. We have, I think, continued to keep the Indian tribes apprised of our work. In fact, our opening testimony this morning will come from a distinguished panel of Indian leaders from different regions of the country.

After receiving briefings and interviewing witnesses, we entered into a more formal phase of the investigation--subpoenaing documents and deposing witnesses. We issued nearly 300 subpoenas to individuals, private contractors and natural resource companies. Additionally, the Committee has received and examined more than 900,000 pages of documents. We have also conducted dozens of depositions and will continue to take additional ones.

The record uncovered by our investigation is not encouraging. Many of the federal Indian programs are fraught with corruption and fraud; most of the others are marred by mismanagement and incompetence. We have found evidence of these problems at all levels -- from Washington, through the bureaucracy, and down to the field. But wherever they exist, the results are the same: American Indians, and the nation, are being badly served by federal programs that do not accomplish their goals and by individuals more interested in lining their pockets than in helping American Indians.

As with other cases of governmental waste and abuse, all American taxpayers end up bearing the burden of these inefficient and ineffective programs. But unlike other, more widely-recognized cases, the abuses discovered by our Committee are contributing directly to the impoverishment of one of our nation's poorest minority groups.

Although the federal government spends three billion dollars a year on Indian programs, the poverty rate for all American Indian families is two to three times the national average. For those on reservations, the poverty rate is four times the national average. According to the most recent Census Bureau statistics, 16 percent of the Indian houses on reservations lack electric lighting, 21 percent lack an indoor toilet, and more than half have no telephone.

As our hearings unfold over the next few weeks, we must remember that every tax dollar wasted by an incompetent administrator and every tax dollar diverted by a corrupt individual comes directly out of the living standard of an American Indian family. Not only are we wasting taxpayer dollars; we are wasting opportunities for American Indians.

On a personal note, let me add that it is not always a pleasant task to try to conduct a vigorous, aggressive and unbiased investigation. An investigation such as this one wins few friends; instead, we have probably alienated, at one time or another, all of the groups under review. Those federal agencies who are put in a bad light and those federal employees who have been shown to have engaged in wasteful or fraudulent activities will not like us. Certainly, the oil and gas companies -- who have produced hundred of thousands of documents and submitted to countless interviews -- are not thrilled with us. Doubtless, they will be even less enamored of the Committee when they are subjected to depositions and further inquiry during our later proceedings. And those in tribal governments who have abused their positions probably wish we would simply go away. We have always believed, however, -- and I know Co-Chairman McCain and Senator Daschle join in these remarks -- that we are obligated to pursue fraud, waste or corruption wherever it exists -- in the federal government, private contractors, and even tribal governments. To do less would be to betray the trust placed in us by the U.S. Senate, the American people, and most particularly the Indians themselves, who stand to lose the most by a continuation of the status quo.

In our first round of hearings, we will focus on the failure of the federal government, particularly the Bureau of Indian Affairs, to ensure integrity and accountability in the federal government's relationship with American Indians. We will specifically address (1) the federal government's role and performance in representing Indians in court; (2) the administration of Indian contracting programs; (3) law enforcement on the reservations; (4) tribal corruption; (5) the infiltration of Indian gaming operations by organized crime; (6) child sexual abuse in Indian schools and elsewhere; and (7) environmental issues. The Committee will hear testimony on these subjects, in no particular order of priority, because we believe they are serious problems which need to be addressed.

There may be other, perhaps equally compelling, problems which will be examined in the coming weeks and may be presented in the Committee's later round of hearings. We now expect to address problems in the Indian Health Service, Indian education, HUD Indian housing programs and the natural resource area during the later round of hearings, along with recommendations for remedying those problems.

One final word about the oil and gas part of the investigation. The Arizona Republic series contained very serious allegations about the diversion of Indians' oil royalties. To fully investigate the merits of these allegations, as well as others we developed ourselves, the Committee has spent substantial resources in this area of the investigation. Due to the complexity of the task -- made infinitely more difficult by the fact that no less than three federal agencies administer the programs -- we have not yet completed our study of that area.

At this point the media's earlier estimates of billions of dollars in underpayments of royalties appear to be overstated, but other significant issues remain to be reviewed and presented later this year. The complexity of the tripartite federal bureaucracy of the Interior Department's Bureau of Indian Affairs, Mineral Management Service and Bureau of Land Management is paralleled only by their Byzantine accounting, auditing and recordkeeping practices. Such complexity clearly frustrates even industry and certainly overwhelms the Indian mineral resource owners. After we have conducted the numerous depositions and have examined additional documents necessary to finish the job, we will present our findings in the spring.

Let me now defer to my colleagues, Co-Chairman McCain and Senator Daschle, for their comments, after which I will introduce the first panel of witnesses.

PREPARED STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA

The Special Committee on Investigations was established during the 100th Congress in response to public allegations of fraud and mismanagment of the federal government's trust responsibility for Indian people and their lands and resources. I believe that Senator Inouye best described the purpose of the Special Committee when he stated that:

> I think that we would all agree that those who are charged with the responsibility of administering Indian programs and services, be they federal instrumentalities, state agencies, or tribal governments, must be accountable -- first, to those for whom a trust responsibility has been established -- the Indian people -- as well accountable to the Congress and the American people. This accountability must be achieved, and I believe, can best be realized, by Indian people working with the Congress and with federal agencies to identify the need for change, and to initiate reform where it may be necessary. The establishment of a Special Committee on Investigations, I believe, will provide us with the capacity to more effectively and expeditiously realize this objective.

As we begin these public hearings I believe that it is very important to reflect upon the purpose of the Special Committee and to bear it in mind as we proceed. In many respects, the work of this Committee is a continuation of previous federal efforts to address the problems which confront Indian people. During this century there have been numerous task forces and commissions established by both the Congress and the President to examine the status of Indian affairs and make recommendations for improvements. In some instances, important laws and policies have been developed and instituted as a result of these prior inquiries. However, it is clear to even the most casual observer that more can and must be done to ensure that the administration of the trust responsibility at all levels of government is carried out in a way that most effectively serves the beneficiaries of the trust - the Indian people - within the available resources of the federal and tribal governments.

Mr. Chairman, I would like to take some time to place the work of this Committee in historic perspective. Our constitution confers on the Congress the ultimate authority and responsibility for the relations between the federal government and the tribes. With this authority and responsibility comes the duty to ensure the fulfillment of the trust. These are not passing whims or fancies of the day. They are solemn legal and, I believe, moral obligations which are deeply embedded in our history as a nation.

The renowned scholar, Felix Cohen, perhaps said it best:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall our political faith . . .

The very 1st Congress spent much of its time in 1789 and 1790 enacting legislation relating to Indians. During that Congress, the War Department was established and was delegated substantial responsibility over Indian Affairs. The Northwest Ordinance was enacted with the famous pledge that "the utmost good faith shall always be observed toward Indians." The first of several Trade and Intercourse Acts were enacted to prohibit the acquisition of Indian lands by non-Indians without federal approval. During this same period, Secretary of War Henry Knox advised President Washington on the military necessity for negotiating treaties with the Indian nations that occupied and possessed the territory which now comprises the United States. Secretary Knox recommended and the President and the Congress adopted a policy of negotiating with tribes as nations. Knox believed that this policy was also necessary to distinguish the national character of the new American government from the previous conduct of the British colonial government toward the Indian nations. Secretary Knox stated that:

> But, in future, the obligations of policy, humanity, and justice, together with that respect which every nation sacredly owes to its own reputation, unite in requiring a noble, liberal, and disinterested administration of Indian affairs.

For most of the next one hundred years, the Congress and the President exerted considerable effort to negotiate, ratify and implement treaties between the United States and the Indian Tribes. In 18~~32~~49, the responsibility for Indian affairs was shifted from the Department of War to the Department of the Interior and the Commissioner of Indian Affairs became responsible for negotiating the treaties and implementing their provisions.

The treaties between the United States and the Tribes all vary in some particulars. However, they all also contain some common principles and provisions. The underlying concept of every treaty was that the tribes agreed to cede vast land areas to the United States while reserving to themselves a permanent homeland. In return for the ceded lands, the United States promised to provide protection against encroachment by non-Indians. Tribes were assured that they could continue to govern their own affairs free from interference by local authorities. Many of the treaties promised federal assistance in the development of agriculture, education, health and various economic pursuits.

The treaty era formally ended in 1871 when the Congress declared that the United States would no longer negotiate treaties with the Tribes. Soon thereafter, in 1887, Congress enacted the first of a series of allotment acts. Under these laws, the reservations were to be broken up into parcels owned by individual Indians. The intent of Congress was to encourage Indian people to become farmers and to promote the non-Indian concept of individual ownership of land. Much has been written about both the purpose and the effects of the allotment acts. It is not my purpose here to re-visit the controversy which surrounds these laws. However, it is important to understand the consequences of the allotment era if we are to understand the situation of Indian people today.

When the allotment process began in 1887 there were about 138 million acres of land in Indian ownership. When the allotment era ended in 1934, there were 52 million acres of land left in Indian ownership. In less than 50 years, 86 million acres of land passed out of Indian ownership. Perhaps of even greater significance was the fact that the allotment program devastated Indian cultures and traditional forms of governance. The legacy of the allotment era is with us today in many forms. Checkerboard jurisdictions and fractionated land ownership are but two consequences of the allotment era which hinder proper managment of Indian resources and the exercise of Tribal self-governance.

The allotment era was replaced with a renewed federal emphasis on tribal self-governance with the enactment of the

Indian Reorganization Act in 1934. Tribes were encouraged to adopt constitutions and reassert control over their internal affairs. Some federal efforts were made to consolidate the tribal land base and to improve the management of tribal natural resources. Most tribes expended great effort to reassert their inherent sovereign powers of self-governance and to once again take control of their reservations.

During the 1950's federal policy shifted again. Congress began the era of termination with the adoption of House Concurrent Resolution 108. Although the Indian Reorganization Act was not repealed, it became official federal policy to terminate the existence of federally recognized tribal governments. Like the allotment policy of an earlier era, the termination policy led to disastrous results. President Nixon best summarized the situation in his 1970 Special Message to the Congress on Indian Affairs:

> . . . The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before . . . The very threat that this [trust] relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political automony is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the federal government will disown its responsibility and cut them adrift.

> In short, one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to federal officials in Washington, D.C., rather than to the communities they are supposed to be serving.

The termination era offically ended when House Concurrent Resolution 108 was finally repudiated and repealed during the 100th Congress. Our current federal policy of tribal self-determination came about in 1975 as a result of the proposal contained in President Nixon's Special Message to Congress in 1970. The goals of the self-determination policy are to reduce federal domination of Indian programs and services while strengthening tribal capabilities and capacities for self-governance. As we know from the hearings held on the Self-determination Act during the last Congress, the policy has generally worked and has been enthusiastically embraced by the Tribes.

Mr. Chairman, I have gone on at some length here and I have not even touched upon the substantial body of law relating to Indian affairs which has been developed by the federal courts. I do want to say that the courts have been much more consistent in their handling of Indian affairs than has been the case here in the Congress. The courts have been extremely diligent in their protection of the inherent authority of the Tribes to regulate their own affairs. They have also been consistent in their view that the Congress possesses the ultimate authority and responsibility for Indian Affairs.

As we exercise our authority and seek to discharge our responsibility, I believe it is important that we avoid the mistakes of the past. In this regard, it is abundantly clear that abrupt swings in federal policy toward Indians have always produced negative results. I believe that many of the situations which we will examine in these hearings are a result of prior inconsistent federal policies. Caution and careful deliberation are necessary if we are to formulate effective policies for the efficient administration of the federal trust responsiblity. Our purpose here is to ensure that all levels of government possess the integrity, accountability and capability to meet the needs of Indian citizens. We must make certain that the Indian people are receiving the full benefit to be derived from their trust lands and resources as well the full benefits of programs and services which are intended for their assistance and well-being. Our work in this Committee should ultimately lead to recommendations which further these purposes. Our overriding goal should be to strengthen and improve the capacity of the federal and tribal governments to effectively and efficiently provide necessary programs and services to the Indian people.

I am hopeful that these hearings will lead to positive recommendations for improvements for consideration by the full Congress.

PREPARED STATEMENT

Submitted to the:

SPECIAL COMMITTEE ON INVESTIGATIONS
SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
Room 838 Hart Senate Office Building
Washington DC 20510

by:

PHILLIP MARTIN, CHIEF
MISSISSIPPI BAND OF CHOCTAW INDIANS
Route 7 Box 21
Philadelphia MS 39350

January 30, 1989

Thank you Mr. Chairman. My name is Phillip Martin, and I am the elected Chief of the Mississippi Band of Choctaw Indians, a tribe of some 5,000 members living on and near 21,000 acres of reservation land in the east central portion of the state of Mississippi. We have received a good deal of attention over the past ten years or so for our successes in industrial and other economic development, having created nearly 1,500 new jobs in our tribal enterprises, and having become one of the largest employers in the state.

The Senate is to be commended for authorizing creation of a special committee to investigate Indian Affairs, and I am honored to be on this panel with these distinguished tribal leaders to express our views to you. I am certain that the findings of the Special Committee will be useful in changing the approach and methods of the Bureau of Indian Affairs and the Indian Health Service, and their relationship with tribal governments. I am highly supportive of your efforts, and look forward to working with you further as you begin to focus in on specific areas. I am interested specifically in administration of the Self-Determination policy, tribal government, health care, infrastructure, and management of facilities' construction.

I understand that this morning the Special Committee is concerning itself with a list of about six topics. I believe my colleagues present today can talk with more authority on some of these subjects than I, because in my 30 years of service with the tribe, I have placed great emphasis and time on development of a proficient and stable tribal government, community development, and economic development -- especially the creation of jobs for the Choctaw people -- and have not had time to get involved in some of these issues. I can, however, make remarks on some: and I will be brief.

Indian Contracting

One of these topics is the first that was listed for me, the area of Buy-Indian and sole-source contracting on reservations. On the Choctaw reservation, all of our businesses, except our construction company, are chartered by the Tribal Council, have boards appointed by the Council, and are thus 100 per cent Indian-owned and operated. The construction company is a state-chartered membership corporation, but only members of the tribe are authorized to be admitted to membership in the corporation, so it too is 100 per cent Indian-owned and controlled. We thus have had no real experience with "Indian front" firms doing business on our reservation, though in past years we have had substantial problems with the quality of work produced by non-Indian contractors who were the low bidders for construction projects in which the federal agency required a bid process. We have heard, however, of Indians being used by non-Indian businesses as fronts, which we completely oppose.

In its consideration of the question of BIA's sole-sourcing contracts instead of putting them out for bid, I would urge the Special Committee to distinguish between the sole-sourcing of contracts to private non-Indian firms, and the sole-sourcing of contracts to legitimate Indian-owned and tribal public enterprises like our tribal enterprises. If the business involved is a tribal business, such a contract would mean the creation and retention of jobs much needed by the reservation population. High levels of unemployment, and their consequences, are the largest single problem in Indian

Country today; and the federal government has the obligation to do what it can to create as many reservation jobs as possible. In fact, I believe that the Special Committee could do a service for reservation economic development by encouraging federal government agencies, particularly the Department of Defense, to procure as many goods and services as possible from Indian tribal enterprises.

Child Abuse

Child abuse, child neglect, and alcoholism have become serious problems for tribal governments. We feel that in part this may be caused by our industrial progress and the transformation of our tribal society from an agricultural economy to an industrial economy, but we are not sure, and have not conducted any studies. There have been no reported cases of institutional child sexual abuse by BIA employees in the schools, but the incidence of child sexual abuse in the community is growing, and there are few means available to us to cope with this.

I believe the major need in this area is a capability for immediate action in social services, law enforcement, and in the schools, action to isolate the child quickly from the problem, to detain the alleged offender, and to carry out a swift but thorough investigation, leading to conviction. But speed of this type is not currently available to us; and the reason is plain and simple: lack of adequate personnel and money. Our Social Services caseworkers have done an excellent job, however, their heavy caseloads do not permit the kind of in-depth family therapy and counseling that would prevent child abuse and neglect. The BIA school system is severely underfunded as well, and cannot afford to purchase needed services, such as hiring a skilled psychologist to work with children and their families. Our Law Enforcement department is underfunded to the extent that it has only one investigator, and in some cases investigations are not conducted in a timely fashion. After the investigation is completed, it is up to the U.S. Attorney to arrange arraignment and decide to take the case to the federal grand jury, and the whole process takes several months to adjudicate, while the alleged offender roams free on the reservation.

Performance of the Solicitor's Office and Gaming

I will leave the issues of the Solicitor's Office's performance and Indian gaming to my colleagues, who have greater experience with those issues. Because I am not commenting does not mean that I think there are no problems to be considered here. I know about the conflicts of interest relating to the use of Indian natural resources and the interpretation of Indian issues like water rights. As for gaming, Public Law 100-497 has been enacted, and the process of appointing commissioners is now underway. I understand that many tribes are not satisfied with the provisions of the Act; and I understand too that for many tribes Indian bingo is very important, because in many cases it is their only form of economic development. A lot of them are not "big" bingo games, but they are a source of income for much needed health care and community services. The incidence of Indian bingo being controlled by outside shady characters is not widespread. Where it does exist, the federal government does have the responsibility of assisting tribes in cleaning it up.

Tribal Corruption

Finally, the issue of corruption in tribal governments is a sensitive and delicate one, and should be based upon a complete investigation with evidence presented. In many cases what causes corruption in any government is the lack of checks and balances, especially in the financial area, and a lack of separation of powers between the executive and the legislative, without adequate descriptions of the differing roles and functions, and adequate job descriptions for all tribal officials and employees. Tribal constitutions are sometimes vague in describing responsibilities and the terms of office for officials are often too short. The original constitution of the Mississippi Band of Choctaw Indians, authored basically by the Bureau, had only one governmental branch, the legislative, whose members served terms of only two years, after which everyone was up for reelection. In 1974, by referendum we changed our constitution, and we now have a Chief elected at large to a four year term, half of the 16 Council members elected to four-year terms every two years, and separation of the legislative and executive branches. This provided us with much-needed stability, insuring the presence of at least eight Council members who have previous experience in the workings of the tribal government, plus an executive branch that could carry out policies in a rapid and businesslike way that was still subject to the oversight of the Tribal Council.

Perhaps the most negative aspect of tribal government corruption is its potential for sabotaging reservation economic development. Self-dealing, kickbacks, and the draining of tribal resources does not permit the accumulation of the critical amount of tribal resources needed to capitalize economic and community development projects. In a word, it sacrifices the potential for raising the standard of living of all of the people to the greed of one or a few corrupt public officials. In such a situation, there is no chance for progress.

The image of corruption in tribal governments has in many cases kept legitimate business and industry fearful of locating on reservations, because they feel that in case of a business dispute, they would not be given a fair legal process. Where corruption does exist, the tribal government, in cooperation with the federal government, has the responsibility to investigate and take the responsible individuals to court. The federal agencies also have the responsibility to assist tribes in setting up solid and stable tribal governmental structures. Tribes also have a responsibility through the democratic process for seeing that the tribal leadership is given to those who are honest and have a positive interest in tribal development, and get the ball rolling. I attribute our progress on the Choctaw reservation in all phases of development over the past three decades to a good tribal government structure and dedicated leadership.

* * *

There are many people who have a greater capacity to comment on these subjects than I, and I am sure you will be hearing from them as the Special Committee pursues its investigations.

Thank you for inviting me to be here with you today.

PREPARED STATEMENT

CHIEF WILMA P. MANKILLER
PRINCIPAL CHIEF OF THE CHEROKEE NATION OF OKLAHOMA

ON BEHALF OF THE
CHEROKEE NATION OF OKLAHOMA

BEFORE THE
SPECIAL COMMITTEE OF THE SENATE
SELECT COMMITTEE ON INDIAN AFFAIRS

JANUARY 30, 1989

Mr. Chairman, my name is Wilma P. Mankiller. I am the Principal Chief of the Cherokee Nation. I appreciate the opportunity to testify before your Special Committee on the several topics that you have identified as being of particular interest at your hearings this morning. I share the Committee's concern over a number of these topics. I hope that my assessment of these issues, and a description of the way the Cherokee Nation has addressed some of them, will be helpful to the Committee.

The first topic I will address, Mr. Chairman, is the responsibility of the Secretary of Interior and his counsel, the Solicitor, for management of the natural resources of Cherokee tribal lands. Allow me to summarize in a paragraph the story of Cherokee tribal lands over the last century.

One hundred years ago, the Cherokee Nation acquired by treaty over 14 million acres located in eastern Oklahoma along, and generally north of, the Arkansas River. By 1910, the 14 million acres of tribal lands had been allotted and transferred to individual members of the Cherokee tribe and the Arkansas Riverbed had been determined by the Secretary of Interior to belong to the State of Oklahoma rather than the Cherokee Nation. Therefore, for the next 60 years the Cherokee Nation held no acknowledged riverbed tribal lands. Finally, the Cherokee, Choctaw and Chickasaw Nations had to sue and the U.S. Supreme Court determined in 1970 that the tribes owned the 96-mile Arkansas Riverbed in fee simple. By this time, however, the Corps of Engineers at the direction of Congress had completed the construction of a series of dams and a navigation channel which occupies one-third of the riverbed. Unfortunately, this federal construction project has seriously complicated any effort to develop or even identify the recently recognized tribal lands in the riverbed.

For nearly 20 years since the Supreme Court's declaration that the riverbed is tribal land, the Secretary of Interior has done little or nothing to identify or survey that land or initiate any actions to remove trespassers. This is true despite the laws Congress enacted to direct the Secretary to manage the oil and gas, the sand and gravel and other surface and subsurface resources on tribal lands. Today, we are unable to remove known trespassers -- who we have identified in the hundreds -- because by statute the only acceptable evidence in a trespass action is a survey certified by the Secretary's Bureau of Land Management. In fact, BLM has completed its survey of only one mile of the 96-mile riverbed it should have surveyed or authorized to be surveyed many years ago. If we could resort to self-help, we would, but our hands are tied.

One very serious result is that natural gas reserves below our tribal lands are being drained by natural gas production from leases adjoining the riverbed. Without BLM-certified surveys, neither we nor the Secretary can defend the mineral leases on the riverbed that the Secretary himself initiated and approved. So, land owners and lessees adjacent to the riverbed are permitted to enrich themselves at our expense and, perhaps more significantly, at the expense of our lessees who have paid for the drilling and production rights to the subsurface resources. We could not possibly be receiving the highest market value for our leases, as required by law, when competitive bidders know the lease they are seeking will not and cannot be defended by the Secretary.

Natural resource management problems between Indian tribes and the Secretary are a topic of future attention by the Committee and I welcome this attention. I have more to say about the Secretary's failures in oil and gas leasing, and sand and gravel and other minerals management, as well as his failure to audit and manage of these leases. Therefore, I would like to supplement the record on this subject if I may, Mr. Chairman.

The second topic the Committee asked me to address is BIA corruption in contracting. This issue has concerned us as well. I would like to take a few minutes to describe several initiatives of the Cherokee Nation to contracting issues before problems actually develop.

The first is our effort to establish an Ethics Commission of the Cherokee Nation. While the tribe has not had a specific comprehensive code of ethics, we always have stressed the importance of good business practices. When I served as Deputy Chief of the Cherokee Nation, I suggested that the Tribal Council consider establishing an Ethics Commission. Once I became Principal Chief, I developed and proposed tribal legislation for implementing such a Commission to provide formal standards of conduct for all Cherokee Nation officials and employees. This proposal is now being considered by a special subcommittee of the Tribal Council. We have provided a copy of our Ethics Commission proposal to the Senate Committee staff prior to today's hearing.

While our proposal obviously needs refinement, I believe it is the sort of self-regulatory initiative that should be implemented by tribal governments, and not imposed by federal or state laws or regulations. I will be happy to work with the Senate Committee and fellow tribal leaders to encourage such initiatives in ethical self-governance.

Another self-regulatory effort undertaken by the Cherokee Nation to avoid problems or even perceptions of conflicts and corruption is our Tribal Employment Rights Commission. While well over a third of all the Indian tribes in the United States have such commissions, the Cherokee Nation has empowered its Tribal Employment Rights Commission with specific authority to regulate contractors and vendors who do business with the tribe under our auspices or those of the BIA. Through the Commission's efforts, we can best protect the integrity of the tribe's financial interests and ensure maximum employment opportunities for tribal members in all contracting activities.

Just to give you a brief idea of the Commission's value to the Cherokee Nation, one of its primary responsibilities is to ensure that each employer, contractor or subcontractor intending to engage in business activity with the Nation must submit a contracting plan and receive plan approval. As the tribe offers substantial preferences to qualified Indian-owned firms, another important function of the Commission is to review and certify any firm seeking to do business with the tribe. To guard against brokering and fronts, the Commission staff requests and reviews all financial and other documentation necessary to determine whether the applicant is, in fact, at least 51% Indian-owned. Once the staff makes its findings, the Commission reviews the file, interviews the principals, and makes its determination. If approved, the firm receives a one-year probationary certification before final certification is granted.

The Commission recently undertook the enormous task of recertifying all contractors with whom the tribe does business. We believe that we have in place the proper procedures for protecting tribal interests. We can always use more federal assistance however, such as guidelines for additional standards to adopt, and technical and financial assistance for training of Commission personnel charged with investigating and certifying potential contractors.

A third issue raised by the Committee is child abuse in BIA schools. Personally, I am not aware of specific instances of child sexual or other abuses in BIA schools. The concern of the Cherokee Nation has been more with abuse of BIA's discretion in use of funds for its schools and the resulting sacrifices in the quality of education those schools provide our children. Our response, once again, has been a "hands-on" solution. The Cherokee Nation has assumed control of the BIA school. Since that time, the tribe has enjoyed major improvements in our education system. We now have a functioning school board which oversees curriculum and teacher qualifications. School texts are much more current, and a more progressive curriculum has been developed. We believe it important that federal and tribal funding be provided for continued upgrading of the residential school environment.

The final topic I have been asked to address briefly is gaming. Congress has recently enacted legislation covering this activity on Indian lands and I expect it may take some additional time before the need for serious changes in the present law can be assessed. There is no Cherokee program promoting gaming as a source of tribal revenue. But we have taken the position that Indian tribes should be permitted to take advantage of gaming as a source of tribal income. Correctly regulated, gaming could continue to be a significant alternate source of tribal revenue particularly when more customary natural resources-based income cannot be enhanced because of neglectful administration of resource management laws.

Mr. Chairman, I thank you and the Committee for the opportunity to testify today.

STATEMENT OF JOE FLETT,
CHAIRMAN SPOKANE TRIBE OF INDIANS
BEFORE SENATE SPECIAL COMMITTEE ON INVESTIGATIONS
SELECT COMMITTEE ON INDIAN AFFAIRS
JANUARY 30, 1989

Chairman DeConcini, Co-Chairman McCain and Senator Daschle and other members of the Select Committee on Indian Affairs:

(I appreciate being given the opportunity to testify before the Special Committee on Indian Affairs. I have been made aware of the topics to be addressed by the Special committee during this round of hearings. Let me say at the outset that I believe the Special Committee has selected issues of importance to my tribe and to the Indian Country as a whole. I would like to address my remarks to the following subjects because I believe these issues are particularly important to my tribe and others in Indian country).

I have the honor of representing the Spokane Tribe as a Councilman now for eight years, three of which have been as Tribal Chairman. The tribe has an enrollment of just over 2,000 members, 856 of whom live on the reservation.

Our revenues are derived fro the sale of timber as well as grants and contracts from Federal and State agencies. The unemployment rate varies from 40% up to over 80% through the year. As of January 1, 1989 the rate was 69%. The average yearly income for the reservation is $9,968 per household, derived from a recent survey conducted this past fall.

With the low income and high unemployment rate come many problems. Alcoholism, child abuse, etc.. Many of our tribal members cannot afford proper housing which is of great concern to tribal leaders. I am troubled by the lack of adequate dollars to cover the costs of constructing proper housing for our people. With the amount of money and the number of houses to be built by the contract we usually end up with a much less quality of home as was originally planned for. Also, the contractor, at times, is not the one who will or can do the right job of building a good quality home.

There are instances in the past, on our reservation, of poorly constructed homes which seem to start deteriorating once the year warranty has expired. Who is responsible for this. There are homes where the foundations have cracked prior to any building of a structure, or one corner of the house that sets 4-6 inches off the foundation. It seems that we are left with only one contractor who is bidding the houses and it is questionable as to the good faith effort to provide a good quality home.

I do not know whether or not the contractor is indeed a legitimate company controlled by Indian people or just a front. I am sure if one could contact other tribes they too would have similar problems. I understand this is one area the committee will be devoting hearings to at a later date.

The committee has announced its intention to address tribal corruption. Although I can only speak to the Spokane Tribe, which is free from these types of abuse, one does hear of other situations with other tribes. I believe that any type of corruption should be looked into, whether it exists in Federal, State or private and Tribal governments, and I support the committee in their efforts on examination of these issues.

In the area of social issues, we like most everyone have problems in the area of child abuse, neglect. Since December of 1987 to December of 1988 there have been 14 charges brought to our Indian Child Welfare Committee. Of these 8 have been substantiated. I know of no cases involving the school system or the various child protective programs with the reservation. There are no BIA schools located on the Spokane Reservation, therefore, I cannot comment on them. The high unemployment rates of reservations has a direct impact on the children.

I would like to comment briefly on Indian Bingo. Our tribe like many others, has a Bingo operation which is run solely by the tribe. With the establishment of the Bingo hall it is easy for one to see the potential for the tribes to lose control of their gaming operations and lose important revenue generated by the gaming activities. The Spokane Tribe was approached by some management companies in the beginning, they had made an offer of developing a 2 million dollar complex "for the tribe". In following up on their proposal contract it was found that most of the revenue generated would go towards the management company.

The proposed contract was for a 15 to 20 year period. Fortunately the council rejected their offer and made the decision to implement and run the bingo operation ourselves. There has been talk of organized crime having control of some Bingo operations, this I don't know, but I feel it could be an area the committee may want to spend some time on. The potential loss of revenue to tribes is too much for tribes to take.

Lastly, I understand the committee will be assessing whether Indian interests are being properly represented by the U.S. Government in their capacity as trustee of Indian people. I do feel this needs to be explored because so many times the needs and interest of Indians take a back seat when they may conflict with other governmental interests.

There are times when the Indian people have to accept something that is less desirable just to get the bureaucracy moving. We often times give in to the government just to get the few dollars that they hold. Example of the waiting period one goes through when in litigation, there are times the tribal interest is lost due to the lack of response from the various governmental agencies. It is aggravating to keep asking a judge to wait when a response from our trustee is pending. It has cost tribes many dollars, to have to come back to our nations capital to talk to the Bureau or whomever will listen, to only find that the necessary paper work has been setting on someone's desk or filed away somewhere.

The regulations imposed on tribes in meeting time schedules should apply to the government agencies also or even more so. In adhering to regulation, the governmental agencies with the responsibility of protecting a resource should be made to comply with regulation also. When a contractor or lessee is in violation of regulations they should not be allowed to continue their work until they are made to come back into compliance. The reverse of this is usually the case to the point of losing a resource of the tribe. Who suffers? Only the Indian people.

In closing, I would like to thank you for this opportunity to address the committee and I fully support the efforts of the committee. Just the idea of having the investigations has brought response from the governmental agencies. On behalf of the Spokane Tribe, Thank You.

PREPARED STATEMENT OF RUSSELL MEANS, MEMBER, OGLALA SIOUX TRIBE

Hau MiTakuyapi, Miya Ma Lakota Oglala, Emujinintanhan Wakinyan Zi Tiospaye Kine Ke Sapa Kin Lila Wakan. MiTakye Ate, Tasunka Witko Tiospaye. This is my people's traditional, and proper way to greet one another. I am bound to give you this greeting, albeit a very short version. My greeting to you in English translates:

Hello my relatives, I am an Oglala Lakota (Sioux). I come from our very sacred land, the Black Hills and Yellow Thunder village.

My father is from the Crazy Horse clan.

My mother is from War Eagle clan. It is to this day, the way all Indians throughout this nation still greet one another. This is the only way we present ourselves to one another that is acceptable. We tell who we are, where we are from, who we are from, our clans, and we can do this without ever saying our name. Anything less would be a insult to you, and my people.

Senators, my morning prayers to the Great Mystery always include you, and your colleagues in Congress, as well as leaders in all government. It is an honor to come before you as a spokesman for my people, the American Indians of the United States of America. In these United States of America, this great country of ours, the American Indian is allowed to be anything they want to be, except an American Indian! It is created by the laws of this country, these United States and condoned by it's subsidiaries, the so-called Tribal Government, and designed for

the Indian to fail, to be expendable, to be eliminated!

I take you back in your history, after the American Indian "Hostiles" had been subdued, and forcibly confined to Indian Reservations, it took approximately thirty years, one generation, for us to adjust and become economically viable. However, allotments were made smaller, our remaining lands were opened to homesteading and we were forced into reducing our livestock. Nevertheless, we made the adjustment in less than half the aforementioned tim, about fifteen years.

Once again, the American Indian was forced into reducing our livestock. The "Boss Farmer" concept was instituted. We were told what, when, where, how much, and how little we could grow. This applied to agriculture, and our livestock. Again we recovered in a time span of fifteen years.

We were so successful in our 3rd recovery that the American Indian enjoyed the finest of economic times! The Red Indian established their own economic system apart from the rest of the civilized, industrialized Americas which at the time was sunk in the Great Depression. It was then, that President Roosevelt introduced the Howard Wheeler Act. Better known as the Indian Reorganization Act (IRA) which institutionalized the so-called Tribal Governments.

We have yet to recover.......

Forty-five years later the I.R.A. Indian Tribal Governments, on their own initiative, began renewed efforts at re-establishing their sovereignty focused on the oldest profession among Indians as the means for a livelihood. Gambling. Bingo, and other gaming operations has without exception proven an initial success. Failure through mismanagement, politics, or litigation has been less than fifteen percent. Showing a better than eighty-five percent success rate the new, Indian sponsored gaming industry on Reservations dwarfed success ratios of any and all other non-Indian industries in America. Gaming operations have proven to benefit the revenue gathering of all Governments, be they County, State or Indian Reservation. With regulation of Bingo, and Gaming by the Congress we are experiencing repetition of history. One shouldn't remedy success.

The Results? The United States Government through the Congress, once again intervenes to regulate a proven success in violation of all basic and fundamental rules of economics, and totally contrary to all the laws of capitalism.

American Indians are Human Beings. We are supposed to be citizens of the United States of America. We fought in your wars in other countries, our Navajo Nation Code Talkers served and saved this nation in World War II. We have the Inalienable Right to joint venture with whom we choose to as long as we do not harm, nor commit fraud upon anyone. There is no piece of evidence anywhere that proves Indians ever conspired with criminal elements to establish Bingo.

The Bureau of Indian Affairs, the infamous Colonial Office of the Department of Interior and the initiator of sleaze in government, has been regulating contracting on Indian Reservations since 1824! This fact alone should convince and teach every student of government that regulation of commerce, and enterprise does not work. In fact, it only produces the opposite result. Graft and corruption is rampant through the contracting auspices of the BIA and its surrogate Tribal Government. Indian front contractors bid for and receive Government contracts only to proceed to build shoddy, dangerous bridges, buildings, schools, roads and dams. The Indian is the scape goat when there is failure, and is always the one indicted. Contracting on reservations have proven historically to breed and feed corruption within the B.I.A. and now, the Tribal Governments.

Within the past two years, I have personally attempted to assist seven Indian Reservations located in the Southwest, Northwest, and the Northern Plains, with economic development. Unfortunately to no avail. The investors I represented were from various groups interested in establishing banks, resorts, Indian Owned Public Relation Firms, factories, fishing ports and International Trade. I now know that Tribal Governments do not want economic development unless graft is a major ingredient.

The BIA is a major player in land leases being sold by petty bureaucrats for as meager an amount as forty dollars. There is a scandal of monstrous proportions occurring in at least two Indian agencies, BIA's Branch of Land Operations and the Branch of Realty. The BIA does not enforce its trust responsibility quite contrary.

In September of 1987, I moved from the poorest county in America, the Pine Ridge Indian Reservation, to the richest area in the country, the Navajo Indian Reservation. There is no difference!

I paraphrase the former Secretary of the Department of the Interior, James Watt, "If you want to see an example of failed socialism, go to an Indian Reservation!". The poorest and richest reservations in our nation suffer from identical problems. Mismanagement, a bloated patronage system, no checks and balances. Tribal Governments' waiver of sovereignty in order to initiate debt. This is not anything new, this is an everyday occurrence in all Tribal Governments.

The problem is LEADERSHIP. In this case it is the lack of. Ironically, everyone including you Senators, refer to the allegedly elected TRibal officials as "leaders". Leaders are supposed to work for a better quality of life for their constituents. It is an insult to my heritage, my ancestors and my dignity as an Oglala Lakota to have the term used loosely.

Many of the tribal officials are honest and sincere men and women who have good hearts. Nevertheless, a vast majority of the tribal officials parasite on the incestuous world of Tribal politics. This is based on the premise of who is the better beggar. Not as our forefathers, the best provider, protector, defender, advocator and friend. The game of who is the most important rules. It's embarrassing.

At the turn of the century American Indians numbered about 230,000 - all traditional. With each succeeding generation we lose our population base, and our spirit as once proud Peoples. The American Indian statistics of deprivation have remained constant since the end of World War II. All other groups of citizens fortunes rise and fall with the G.N.P. The American Indian statistical line remains constant, a straight line. With the blatant genocide of our traditional people we have less than 50,000 in America today. We are averaging a loss of 1,000 a year since 1900. We are losing a value system as distinct people that sets up apart from the industrialized world. These facts surface in our Tribal statistics. No one attempts to do anything about it except for a few social workers, and reservation police.

This new statistical deprivation is women and child abuse. Child sexual abuse is epidemic on Indian Reservations and all you hear are whispers. This abuse can be directly attributable to the schools on the Reservations. Education in the BIA, Public, Contract and Missionary schools do not reach positive values from non-Indian culture and in collusion with the BIA, certainly do not allow Indian culture and values to be taught. The fact is, educators continually denigrate American Indian traditional lifestyle as primitive, dirty and without any redeemable virtues.

Needless to say, every time the U.S. Government has interfered with American Indian lifestyles it has proven to be disastrous.

In the 1960's legal services were implemented on Indian

Reservations. It was a boon for the People. Tribal officials all of a sudden were held accountable. Legal services stepped in and Lo and Behold the tribal courts obtained power through the Power of Attorney for the People. The Result? An edict from Washington, D.C. is handed down and legal services can no longer represent People against the Tribal Government and they can no longer represent class action lawsuits against any government. Presently legal services are not much more than a mill for divorce lawyer trainees.

Congress passed the American Indian Religious Freedom Act in 1978. To date, only six cases concerning our Freedom of Religion have reached the Supreme Court. We lost every one. We do not win lawsuits. State governments lose, the only time we allegedly "win", it is in reality the Federal Government winning out over the sovereign rights of a state.

Once again, the American
Indians are the pawn.

Mitaku Oyasin
We are all related.

PREPARED STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA

This afternoon we examine the adequacy of the federal government's legal representation of American Indians.

The United States acts as a trustee for the property rights of American Indians - rights to land, water, hunting, fishing and mineral resources. The Supreme Court holds that the federal government's trusteeship for American Indian lands and resources "should ... be judged by the most exacting fiduciary standards"[1], and that the government is "bound by every moral and equitable consideration to discharge its trust with good faith and fairness."[2]

Whether our government is fulfilling its trust obligation to the American Indian is of central importance to this investigation. As part of its responsibility, the federal government, through the Departments of the Interior and Justice, must assure that American Indians are represented in litigation affecting their interests.

America's most noted advocate of American Indian rights, Felix Cohen, took the obligation of legal representation so seriously that he worked tirelessly for fourteen years to champion American Indian causes as an attorney at Justice and Interior. Cohen, who wrote the leading handbook on American Indian law, always insisted on the high stakes involved in ensuring proper legal representation of the American Indian.

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[1] Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

[2] United States v. Payne, 246 U.S. 446, 448 (1924)

"Our treatment of [American] Indians," Cohen once wrote, "even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[3]

Ensuring adequate legal representation of the American Indian has been important not only to Roosevelt New Dealers, like Felix Cohen, but also to modern Republicans. President Nixon, in 1970, made this issue the central focus of his policy Statement on American Indians. President Nixon remains sufficiently concerned about legal representation that he has sent the Committee a letter for today's hearings. I will now read the letter.

[READ NIXON LETTER]

Our witnesses today will present their views on how the legal representation process has worked during the last twenty years. They will testify that the sixties and seventies were an active time of advocacy and affirmative litigation by the federal government for the American Indians, as compared to this decade which saw little affirmative litigation filed on behalf of American Indian causes and even fewer legal accomplishments. The distinction between the two period is undoubtedly due, at least in part, to the selection of officials for the top positions at the Departments of the Interior and Justice. Yet, many of the problems are also procedural and may well be systemic.

This afternoon our witnesses will appear on two panels.

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[3] Cohen, Handbook of Indian Law (2d ed. 1982).

Messrs Leonard Garment and Brad Patterson will appear on our first panel, to present their overview of the 1970 Nixon Policy Message on American Indians and to relive with us the highlights of that Administration's accomplishments on federal Indian relations.

Messrs Reid Chambers and Louis Claiborne will comprise the second panel. They will present their perspectives both on their government experience in representing the federal government in its role as trustee for the American Indians and their view on how the process of legal representation is working today.

Later in the hearings we hope to hear from a number of other individuals, including former Solicitor Generals Archibald Cox and Erwin Griswold and former Deputy Attorney General and Federal District Court Judge Harold Tyler, Jr.

Today, we have not asked for testimony from representatives of the Departments of the Interior and Justice because neither Department has granted this Committee access to documents involved in American Indian litigation. Despite months of discussion and negotiation, we have not been provided materials from any open or closed cases involving American Indians. Recently, Co-Chairman McCain and I wrote to Attorney General Thornburgh and Interior Secretary-Designee Lujan to request more expeditious handling of our requests for documentation. Meanwhile, we are clearly impeded in our ability to examine whether litigation has been conducted properly on behalf of American Indians.

RICHARD NIXON

January 26, 1989

577 CHESTNUT RIDGE ROAD
WOODCLIFF LAKE, NEW JERSEY

Dear Senators:

I write to commend you and your colleagues on the Special Committee on Investigations of the Senate Select Committee on Indian Affairs for readdressing the important question of whether the first Americans are coming in last as far as the priorities of the Federal government are concerned.

It has once again become fashionable, as it should, to focus on expanding economic opportunities for black Americans. But I hope that this new tide of interest in civil rights does not leave American Indians high and dry as it did in the 1960s. Our goal in 1970 was to replace Federal programs that were both grossly ineffective and also demeaning to these Americans with policies that would give them more control over their own destinies. As President, I took special pride in supporting the policy of "Self-Determination Without Termination," whereby my Administration endorsed Indian control and responsibility over government service programs.

Many of the goals I enumerated in my Special Message to the Congress on Indian Affairs on July 8, 1970 were enacted. I hope your Committee will consider one proposal that was not: my call for the establishment of an Indian Trust Counsel Authority. I felt then, and I still feel today, that only the creation of an independent legal body can rectify the inherent conflicts of interest facing the government in representing Indian interests. As I said in the Message:

"Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists."

In the critical area of administration of their land and water rights, the Indian people deserve to have their interests stated and represented unequivocally. In this as in many other areas, when Washington bureaucrats feud with one another, the rest of the nation loses.

Sincerely,

Hon. Dennis DeConcini
Chairman
Hon. John McCain
Co-Chairman
Hon. Thomas A. Daschle
Special Committee on Investigations of
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

213 Special Message to the Congress on Indian Affairs. *July* 8, 1970

To the Congress of the United States:

The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country—to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

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8. *Indian Trust Counsel Authority*

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

In order to correct this situation, I am calling on the Congress to establish an Indian Trust Counsel Authority to assure independent legal representation for the Indians' natural resource rights. This Authority would be governed by a three-man board of directors, appointed by the President with the advice and consent of the Senate. At least two of the board members would be Indian. The chief legal officer of the Authority would be designated as the Indian Trust Counsel.

The Indian Trust Counsel Authority would be independent of the Departments of the Interior and Justice and would be expressly empowered to bring suit in the name of the United States in its trustee capacity. The United States would waive its sovereign immunity from suit in connection with litigation involving the Authority.

PREPARED STATEMENT OF BRADLEY H. PATTERSON, JR

Mr. Chairman and members of the Subcommittee: my name is Bradley H. Patterson, Jr., and I am a recently retired member of the senior staff at the Brookings Institution. Previous to my 11 1/2 years with Brookings, I was a federal career executive serving first in the Department of State (1945-1954), then as the Deputy Cabinet Secretary at the White House (1954-61), the Executive Secretary of the Peace Corps (1961-62) and in various other assignments. From September 1969 until November of 1974 I served again on the White House Staff, this time as the Executive Assistant to the Hon. Leonard Garment, Special Counsel to the President, and the unsung major actor who was the principal shaper of the progressive policies of that era in civil rights and Indian affairs. I stayed on under President Ford who later formally designated me as the White House aide responsible for the coordination of Indian issues. It is from the seven years' experience under Presidents Nixon and Ford that I appear before the Subcommittee today.

In this effort, I was also a colleague of Ms. Bobbie Green Kilberg who was on John Ehrlichman's staff and of Mr. Robert Robertson who was on the Vice President's staff.
All of us whose names I have mentioned are very proud to have been involved with the initiatives that the President took in those years to improve both the legal and the economic status of American native peoples.

I can sum up my testimony in one sentence, howver: Presidential initiatives are nearly useless without surveillance and follow-through by the presidential staff itself.

Why? Because so-called "bureaucrats" drag their feet in opposition to their President? No, I am not saying that this afternoon. Because even some of the President's appointees are secretly trying to undermine his policies? I am not saying that either. My assertion is that when the President -- any President -- does what Presidents are uniquely expected to do, that is, enunciate precedent-breaking new solutions to old problems, the very newness, the abruptness of departure from past practice, come as a shock to other Executive Branch officials outside the perimeter of the White House. "But we've never done that before!" is often the dazed and disbelieving reaction -- from political as well as career executives.

It was just such a shock which President Nixon administered to his Executive Branch on July 8, 1970 when he issued his landmark Special Message on Indian Affairs. On the administrative Richter Scale it was 9.9 -- and now, nearly 19 years later, I think I still detect dusty plaster continuing to cascade from old ceilings.

In his 1970 Message, for example, the President announced that the old policy of forced termination of Indian reservations was "wrong" -- yet it was not until four years later that the Menominees got their reservation restored and I believe it has taken 18 years before the Congress finally revoked the 1953 termination resolution. The President declared that Indian leaders should be "participating in policy development to the greatest possible degree." But it took unremitting White House staff pressure on both OMB and the Department of the Interior to reopen the Alaska Native Claims issue in 1971, to invite Alaska Native leaders themselves to give us their views and to re-write the proposed legislation to reflect those views. (I salute the Congress for its thorough yet prompt action in approving the Alaska Native Claims Act within a year after the President sent it forward.) I want to pay special tribute to Messrs. Robert Robertson and C.D. Ward of the then Vice President's staff-- they from their office and we from ours joined efforts to keep the President's proposals on track.

Perhaps the best example of the need for diligent surveillance and follow-through after a Presidential initiative is found in the specific policy area in which this Subcommittee today is interested: the measures to guarantee to Indian tribes the special protection of their treaty and trust rights.

What did the President say in his 1970 Message?

> "The United States Government acts as a legal trustee for the land and water rights of American Indians... Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill... No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise."

The President then proposed some special new machinery "to assure independent legal representation for the Indians' natural resources rights."

That special machinery -- the idea of an Indian Trust Counsel Authority -- was not then (and still has not been) instituted, but as soon as the Message was issued, the duty fell, in the interim, on the group of us Presidential and Vice Presidential staffers to find some way of guaranteeing that in any proceeding where Indian trust rights were under challenge, the voice of the federal government as the Indians' legal trustee would be heard clearly and directly.

The Yakima Tribe, for instance, complained that the long-ago federal government mistake of mis-filing the treaty map of their reservation boundaries and then compounding the mistake by creating a National Forest where their lands had been, should be rectified. The Forest Service and Agriculture's General Counsel sputtered and shuddered at the thought of rectification but we insisted that the Attorney General take another look, and on his advice President Nixon gave the land back to the tribe.

The Department of Justice lawyers hesitated at arguing in Judge Boldt's court that the tribes in the Northwest had treaty rights to much of the salmon in Puget Sound. Through some informal but direct conversations, we stiffened their spines and the resulting Boldt decision is one of the landmark monuments to the reaffirmation of treaty promises.

In 1971 the Internal Revenue Service had pursued an Indian named Bryan Stevens all the way to the Ninth Circuit on a tax evasion charge, which, Stevens argued, negated his trust rights. Only when a very quiet but very determined gentleman by the name of Leonard Garment directly reminded them of the President's policy did the Justice and Treasury lawyers reluctantly agree to append to their prosecution brief a statement by Interior giving the Federal arguments in the

Indian's defense. That made the difference to the judges: they ruled in Stevens' favor. (Stevens v. Commissioner of Internal Revenue, 452 F. 2nd 741 (9th Cir. 1971)).

That was the same Leonard Garment who drafted the letter John Ehrlichman signed to the Attorney General on February 15, 1972 reminding him that the White House wanted any future Justice brief challenging an Indian natural resources trust interest to be accompanied by a parallel brief from Interior upholding that interests. To his credit, Attorney General Mitchell promptly consummated a Justice/Interior "understanding" which incorporated the White House initiative. Within two months (and after an amicable luncheon with Special Counsel Garment in the White House mess) Solicitor General Erwin Griswold agreed to apply the "split brief" procedure even to cases in the Supreme Court.

In 1974, a second Indian tax case with trust rights implications arose, and a split brief was filed, but only after President Ford's White House assistants (then Associate Counsel Ms. Kilberg, and myself) again firmly reminded Justice that the policy of 1970-72 still held. In this case (Critzer v. United States, 498 F. 2d, 1160, 1974) the Circuit Court chided the Justice representatives for what seemed to them the executive's inability to speak with one voice. Deputy Attorney General Harold R. Tyler, Jr. thereupon (in July of 1976) told the White House that he was going to abandon the earlier policy -- a move which the Interior Solicitor H. Gregory Austin contested. The Ford administration was nearing its end at this point, but I call the

Subcommittee's attention to Mr. Tyler's letter of last November 2 in which, now as a private citizen, he looks back at that controversy and comments:

> "...in hindsight...I would regard federal government legal representation of Indian natural resource trust interests as a bit different than most of the types of bifurcated representation which concerned us in 1975 and 1976. Put differently, the peculiar interest of the United States government in Indian affairs may well set this issue apart for special consideration."

I am sorry to note that President Carter's Attorney General, Griffin Bell, cancelled the 1972 understanding. To the best of my knowledge there has been no officer in either the Carter or the Reagan White House to resist this relapse; apparently we are now back to the old, comfortable but to my mind improper pre-Nixon practice of hiding from any Court's notice the trusteeship views of a Solicitor or Secretary of the Interior if they conflict with the Department of Justice's judgment.

Of course it may appear messy for a Justice Department lawyer to present a split brief to a court -- messy to the barrister, messy to the bench. In my opinion, however, that is what courts are for: to judge. In Indian trust cases, the federal trustee's voice must be heard as distinctly as any other federal view coming from the Justice Department; judges should then not shirk from doing what they are appointed to do: deciding the tough issues.

Until a Trust Counsel Authority or some other mechanism is designed to meet the need of guaranteeing the representation of Indian trust rights, I believe that the 1972 understanding, put in place by Attorney General Mitchell at Garment's and Ehrlichman's urging, should be reinstated. And, as before, it will have to be policed by an alert White House staff.

One final point about Indian legal matters: just a few years ago a document was brought to my attention which I want to be sure the Subcommittee knows about; I attach it at the end of my written statement. The document is called a "Statement of Policy" and it is in effect a compact, dated April 19, 1984, among the Governors of the States of Arizona, New Mexico and Utah and the Chairman of the Navajo Tribal Council. It promises government-to-government relationships among the four, provides for close and regular consultation among them, and sets forth their agreement that neither the Navajo Nation nor any of the three States will file lawsuits against one other before they sit down with one another and consult to try to resolve issues of conflict without going to court. I applaud this refreshing departure from the state-tribal polarities of years past, and hope the Subcommittee will urge other States and tribes to follow this example.

****

Allow me to conclude my testimony with some observations about Indian policy issues which stem from my fourteen years of experience on the White House Staff. These observations are seven in number.

1. Indian affairs pay no attention to Cabinet boundary-lines. My last task in the Ford Administration was to draw up a memorandum part of which was a listing of the jurisdictional areas in the Executive Branch which had important money or policy roles to play affecting native Americans. I found that there were 52 offices in 17 departments and agencies which belonged on that list. I believe these numbers are still accurate, but this means that there is a requirement for interagency coordination about Indian affairs. Even with our progressive policies in the Nixon-Ford years, our own interagency coordination was chancey and *ad hoc*. Such coordination was not done by OMB; it could not be done by Interior or any other single agency; and it should not be done by putting the BIA in the Executive Office of the President. The Garment/Patterson/Kilberg/Robertson team supplied what coordination there was.

I recall a cocktail party during the Carter years at which I found myself introducing the Assistant Secretary of the Interior for Indian Affairs to the Assistant Secretary of HEW for Human Development ~~Resources~~ (including Indians). They had been colleagues in the same administration for at least a year but had never met. I hope that the new Bush administration might consider creating an Assistant-Secretary-level Cabinet subcommittee on Indian policy issues. I should respectfully advise the Subcommittee, however, that coordination is an executive responsibility; committee or other executive branch mechanisms should not be ordained by statute.

2. the White House Staff must play a role in policy coordination on Indian affairs. Not only are there some 52 federal bureaus which handle Indian affairs, but there are 83,672 State and local government units in our American federal system, including the 506 recognized Indian tribes and groups. Beginning in the Eisenhower years, the White House has usually had one staff person or a group of officers specializing in intergovernmental relations issues. I call the Subcommittee's attention to President Reagan's Indian Policy Statement of January 24, 1983 in which he emphasized that "our policy is to reaffirm dealing with Indian tribes on a government-to-government basis" and located the White House staffer for Indian matters in his personal Intergovernmental Affairs Office. But for a second time I respectfully suggest that this is an area for presidential discretion, not legislative specification.

3. One of the issues most needing Congressional action, i.e. a resolution in statute, is the problem of sovereignty, and specifically the question of Indian jurisdiction over non-Indian lands and rights which are located within the recognized boundaries of Indian reservations. As the Subcommittee is aware, many of the Indian reservations in the northwest are vast checkerboards of land ownership; there is unease in both Indian and non-Indian neighborhoods about who governs what within those borders. Only the Congress can sort out the jurisdictions and I hope that this Subcommittee, or the Select Committee itself, will turn its attention to this issue, consulting with Indian and non-Indian representatives as it does so.

4. I am dismayed, although not surprised, at the lack of coordination within the Indian community itself. I can still remember Mr. Garment and myself bending our efforts to convince the Treasury Department to support a bill authorizing the issuance of tax-exempt bonds for economic development by the Hopi Tribe, but then hearing a Hopi "traditionalist" argue with me that "If a young Hopi wants a job, let him leave the reservation." The Pine Ridge Sioux were deeply divided internally, and the AIM guerilla-theater artists exploited those divisions, culminating at Wounded Knee in 1973. Men and women near the top of the Executive Branch who are trying to resolve Indian policy issues among contending departments are themselves frustrated, weakened and in the end tend to become burned out by disunity among native American groups. I am sure the Congress experiences similar frustrations.

5. Is there sufficient executive education for younger Indian men and women who are moving into leadership positions in tribal administration? It has been a continuous policy thread, in the Executive and in the Congress since 1970, to foster self-determination and to strengthen tribal government. But modern tribal government demands trained administrators, executives who are strong in economics, financial management, political science, public administration. I would hope that the Subcommittee would consider whether current educational opportunities for today's and tomorrow's tribal leaders are sufficient in this regard. Tribes themselves must modernize and design tribal personnel arrangements which feature support from professional civil

servants rather than outmoded Jacksonian "spoils system" practices.

6. Underneath all of our laws and systems we should never underestimate the role of luck, chance, accident and the personal commitment of individual human beings. It was Edgar Cahn and his associates who wrote a book, "Our Brother's Keeper" and it was Mr. Cahn who brought that book to the attention of Leonard Garment soon after the latter entered the White House. Would Garment be interested in meeting some of the Indian spokespeople who helped author that book? He would, and so would the Vice President, who chaired a National Council on Indian Opportunity. The historic meeting was held and that initiative spurred both Mr. Garment and myself as well as the Vice President's staff to take a closer look at Indian policy issues.

Coincidentally, Richard Nixon kept remembering his football coach at college, Wallace "Chief" Newman of whom Nixon later wrote:

> "Newman was an American Indian, and tremendously proud of his heritage... There is no way I can adequately describe Chief Newman's influence on me... He...gave me an acute understanding that what really matters is not a man's background, his color, his race, or his religion, but only his character... I think that I admired him more and learned more from him than from any man I have ever known aside from my father." (Memoirs, RN, Vol. I, pp 23-24).

This was, then, the President who reacted so favorably to the Garment-Ehrlichman suggestion in the Fall of 1969 that his White House staff should mark down Indian affairs as an area for new presidential policy initiatives. This was the President, who, when signing the Blue Lake restoration bill, delayed his departure for a Commerce Department ceremony to celebrate the U.S. economy's reaching $1 trillion GNP and let his scripted lines lie on the table while he rose to say extemporaneously:

> "That $1 trillion shows one side of the strength of America. But today, in the eloquent comments of [Taos Pueblo Cacique]... Romero, we saw another side, a side that money cannot measure -- eloquence, a deep spiritual quality, and the strength that the Indian people, the first Americans, have given to America..."

Litle wonder that there was White House leadership for a new beginning in Indian policy. We were all fortunate, as well, in having men and women in the Senate and the House who put partisanship aside to support those new beginnings. We are fortunate now that this Committee and this Subcommittee are led and staffed by men and women of similar commitment.

7. Yet, whether stemming from luck or leadership, the implementation of public policy in our far-flung executive branch depends, on the one hand, on skilled and faithful professionals who make the system work in its farthest reaches and on the other hand, on top staff people in Washington who realize just how complicated that system is. I close with a story about John Ehrlichman. After he left the White House and before he went to prison, he performed some personal penance out in the Black Mesa area of the vast Navajo Reservation. He would occasionally telephone me at the Ford White House, asking, for example, if we could help him find a surplus government four-wheeled-drive vehicle which could be used as ambulance in those nearly roadless distances. Once John came back to town and the two of us had lunch in a secluded corner of a Washington restaurant. John grew reflective, then remarked: "If I had it to do all over again,

and wanted to hire an assistant to work in the White House, I would tell a successful staff newcomer: 'Here is a plane ticket. Now you get yourself out to the farthest possible end of the federal government's so-called 'service delivery system' and work out there for six months. *Then* you come back and we'll say 'Here's your job in the White House.'"

I thank the Subcommittee for this opportunity to present some personal views and congratulate it and its staff for taking up this task.

Attorney General

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JOHN BIGELOW
Deputy Attorney General

MEMORANDUM

DATE: April 24, 1984

TO: All Assistant Attorneys General

FROM: Paul Bardacke, Attorney General

On April 19, 1984, Governor Anaya and I attended a meeting in Window Rock with the Navajo Nation and the State of Arizona. The purpose of the meeting was to explore ways to foster communication and cooperation between the State and Indian governments. The outcome of the meeting was the attached Statement of Policy, signed by Chairman Zah, Governor Anaya and Governor Babbitt.

The Statement of Policy reaffirms the commitment of the State-Tribal governments to work together in a spirit of good will to address our common concerns. It calls for regular meetings and sets up four points of procedure concerning discussions. I particularly call to your attention Paragraph 4(d) which states:

> The Attorney General of the Navajo Nation and the Attorneys General of the respective states will consult with one another, prior to the filing of any litigation involving the Navajo Nation and the respective state governments as opposing parties.

I would appreciate it if you would keep these principles in mind when working on issues affecting tribal relations. Also, please let me know immediately of any contemplated lawsuits involving the Navajo Nation.

Thank you.

Attachment (1)

STATEMENT OF POLICY

1. There are mutual issues and problems facing the parties hereto concerning both Navajo and non-Navajo people living within the various jurisdictions, and the parties agree that a procedure setting out a cooperative joint effort shall be coordinated to address these issues and problems; and

2. The Navajo people are citizens of the State of Arizona, the State of Utah, or the State of New Mexico as well as of the Navajo Nation, and possess all the privileges and rights afforded citizens of these States, and are entitled to the same services and benefits afforded by these States to their citizens, consistent with law; and

3. Due to the sovereign status of the Navajo Nation and its geographical location in three (3) states, the States and the Navajo Nation have been in confrontation over issues such as taxation, water rights, state services to the Navajo people, and other issues where the interests of the States and the Navajo Nation are at odds or where the extent of jurisdiction of the parties are not clearly defined; and

4. Coordination and cooperation between the parties will improve the delivery of services to all people within the affected jurisdictions.

IT IS HEREBY AGREED BY THE CHAIRMAN, NAVAJO TRIBAL COUNCIL, THE GOVERNOR OF THE STATE OF ARIZONA, THE GOVERNOR OF THE STATE OF NEW MEXICO AND THE GOVERNOR OF THE STATE OF UTAH THAT:

1. The interactions of the State of Utah, the State of Arizona, and the State of New Mexico with the Navajo Nation shall be predicated on a government to government relationship.

2. The relationship will be carried forward in a spirit of cooperation, coordination, communication and good will.

3. The parties hereto agree to meet together on a regular basis in order to insure that the intent of this Statement is carried out.

4. Issues of mutual concern to the respective governments shall be addressed through the following structure:

a. The initial negotiations shall be conducted by the appropriate Division or Department;

b. The Chairman and each Governor will designate a person on their staff with whom the Divisions and Departments will consult as needed;

c. The Chairman and the Governors shall be kept informed of issues of potential conflict by their designated staff person and shall give such direction as is necessary to resolve those conflicts as early as possible;

d. The Attorney General of the Navajo Nation and the Attorneys General of the respective states will consult with one another, prior to the filing of any litigation involving the Navajo Nation and the respective state governments as opposing parties.

5. The parties hereto request the United States Advisory Commission on Intergovernmental Relations join them and the Commission on State-Tribal Relations in a study of relationship among the four governments.

6. The parties hereto shall do all things necessary and proper to inform and direct their respective governments to implement the provisions and intent of this Statement.

EXECUTED this 19th day of April, 1984.

Governor, State of New Mexico

Governor, State of Arizona

S/

Governor, State of Utah

Chairman, Navajo Tribal Council

PREPARED STATEMENT OF LEONARD GARMENT, SPECIAL CONSULTANT TO PRESIDENT NIXON (1969-74)

Some of us are here today to try to complete a vital piece of work begun during the Nixon administration. We are urging that Congress finally implement the idea of an Indian Trust Counsel Authority. In some matters on which the United States government must go to court, the position adopted by the Department of Justice does not take account of the interests and claims of American Indians, but the federal government is trustee for the American tribes, and is both legally and morally bound to protect and promote those interests. A Trust Counsel Authority would insure that, in situations of conflict, the Indians would receive separate U.S. government representation in the courts.

In the past few weeks, the press has been paying a great deal of attention to American Indians -- but not, unfortunately, to the serious problem of legal representation. Instead, we have been reading about allegations of Indian corruption, among some tribal leaders and their cronies and bureaucratic allies in the Bureau of Indian Affairs.

Whenever this issue comes up, some critics point their fingers at the news stories and say, "Look, these are the people to whom you want to give legal independence. They can't exercise even their present limited freedom responsibly, let alone cope with any new grants of power."

The people who say this are profoundly wrong. Whatever corruption may exist here is what happens wherever government is given large amounts of money to dispense, great power over people's lives, and great discretion in using that power, whether it is in a Poverty Program or a Small Business Administration or the Department of Defense.

What we are seeing is not Indian corruption. It is the corruption that occurs almost universally when government has too much discretionary power and individuals too little.

You can attack this pathology only by giving people more, rather than less, responsibility and a greater rather than a lesser sense of their own real interests. It is for this reason as well, and not just because of the clear legal obligation, that the idea of an Indian Trust Counsel Authority is sound and, indeed, indispensable. It is also long overdue.

Report and Recommendations to the President of the United States

Presidential Commission on Indian Reservation Economies
November 1984

Executive Office Of The President
Presidential Commission On Indian Reservation Economies
Suite 765 □ 1717 H Street, N.W. □ Washington, D.C. 20006 □ (202) 653-2436

November 30, 1984

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We are pleased to submit to you the Report of the Presidential Commission on Indian Reservation Economies which, consistent with your charge to the Commission, identifies legal and governmental obstacles to economic development on reservations and offers recommendations to all levels of government, including tribes, intended to promote reservation economic growth.

In the preparation of these recommendations we listened most attentively to the views of Indian people themselves, who testified formally at 16 hearings and counseled with us and our staff on a continuing basis. Additionally, we utilized previous studies, experts in the field, survey data and special staff reports to identify legal, governmental and other barriers to economic development.

In arriving at our recommendations we were mindful of several general principles: the importance of preserving the government-to-government relationship which is a cornerstone of your Federal-Indian policy; the need to recognize and build upon the ever growing competence of Indian people and their leaders; the importance of encouraging individual Indians to enter the business world; the need for tribes to act to promote business development on reservations by Indian and non-Indian entrepreneurs; and the importance of extending to tribal governments the regulatory and financial incentives available to other governments.

In the light of our findings and consistent with these broad principles and goals, we offer this report and recommendations for your consideration. We deeply appreciate your high level of commitment to Indian people which resulted in the creation of this Commission and thank you for your sustained support.

Respectfully submitted,

Robert Robertson
Co-Chairman

Ross O. Swimmer
Co-Chairman

FOREWORD

President Reagan established the Presidential Commission on Indian Reservation Economies by Executive Order 12401 on January 14, 1983, to identify obstacles to Indian reservation economic development and to promote the development of a healthy private sector on Indian reservations. Nine Commissioners, Indian and non-Indian, were appointed to serve on the Commission. They were selected for their backgrounds in business, Indian affairs and government. The Commissioners spent more than a year identifying specific impediments to Indian reservation development; analyzing the interrelationships among problems; proposing and refuting among themselves different conceptual approaches to solving problems; and finally deliberating on appropriate recommendations to be made to the President. It also engaged in a number of special initiatives, working with Indian tribes, federal, state, local governments and businesses.

Part I contains the recommendations of the Commissioners, but the reader is directed also to Part II which puts forward the findings upon which the recommendations were made and presents a systematic identification of the problems found.

The Commission began its work with three assumptions. The first assumption was that obstacles impairing Indian reservation economic development are known by the Indian people. The second assumption was that the technology for analyzing how obstacles impeded economic success was also known and could be applied to studying the problems. The third assumption was that the President's American Indian Policy Statement of January, 1983 would set the parameters within which recommendations would be made.

In order to fulfill the charges set forth in the Executive Order the Commission conducted 16 field hearings throughout the United States. In addition, the Commission reviewed previously identified obstacles in the Indian economic development literature. In conjunction with the identification of obstacles from the hearings and literature review, additional studies were undertaken to expand the points of view on obstacles and to better analyze their interrelationships and impacts. These were: a critical path to failure study of federal programs and administrative systems which impact on Indian economic development, an analysis of intergovernmental conflicts, and a private sector survey on opportunities and constraints.

In the process of taking oral and written testimony, developing concept papers, and meeting with individuals representing tribal governments, Alaska villages, Indian businesses, Indian business and social organizations, banks, law firms, venture capital firms, small and large businesses, universities, investment bankers, and federal, state, and county governments, the Commission has learned that there is consensus on what the problems are and on the need for fundamental change. In fact, the major Indian organizations have been calling for change since the American Indian Policy Review Commission delivered its Report in 1976.

We believe it is now time to act.

Co-Chairman, Robert Robertson

Co-Chairman, Ross O. Swimmer

Washington, D.C.
November 30, 1984

REPORT AND RECOMMENDATIONS OF THE
PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

Part I

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Part One

I THE COMMISSION

HISTORICAL PERSPECTIVE AND MANDATE OF THE COMMISSION

President Ronald Reagan, on January 24, 1983, issued the Administration's American Indian Policy Statement. His comprehensive policy declaration reaffirmed the government-to-government relationship of Indian tribes with the United States, recognized the primary role of tribal governments in reservation affairs, and called for special efforts to develop reservation economies.

This policy is an extension and an expansion of the 1970 national Indian policy of self-determination for Indian tribes set forth by President Nixon. The concept of self-determination was a major departure from past American Indian policy. For nearly 200 years national policy had wavered on the one hand towards the goal of removal, or separation from the rest of society, and on the other hand, towards the goal of assimilation, or absorption of the Indian culture into the dominant culture.

Self-determination was a new concept that would make it possible for Indian tribes and people to maintain their distinction as Indians, while at the same time to develop new ways of life which they would choose, including economic activities which would enable them to fit into the modern world and present-day American society.

President Reagan emphasized that it was the goal of his administration to turn the ideals of the self-determination policy into reality. The principles of self-determination and of self-government set forth in the 1970 national Indian policy and in the 1975 Indian Self-Determination and Education Assistance Act were good starting points. However since 1975 there has been more rhetoric than action.

The President pointed out that movement towards effective self-determination would be accompanied by continued fulfillment of the federal trust responsibility for the physical and financial resources held in trust for the tribes and their members. In addition, he called upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the Federal-Indian relationship. The Congress had already implicitly rejected the termination policy by enacting the 1975 Indian Self-Determination and Education Assistance Act. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to engender among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. The President stressed that a lingering threat of termination has no place in his administation's policy of self-government for Indian tribes.

The policy statement went on to hold that such actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite, or perhaps because of its good intentions, the federal government has been one of the major obstacles to Indian economic progress. The President has committed his administration to removing impediments to Indian economic development and to encouraging cooperative efforts among tribes, federal, state and local governments, and the private sector toward developing reservation economies.

The President's policy recognized that while tribal governments have the primary responsibility for meeting the basic needs of their communities, they can not succeed without viable economies. As a major initial step, President Reagan established the Presidential Commission on Indian Reservation Economies. The Commission, comprised of tribal, private sector and federal government leaders, was charged to identify obstacles to economic growth in the public and private sector at all levels, to examine and recommend changes in federal law, regulations and procedures to remove such obstacles, to identify actions which state, local and tribal governments could take to rectify identified problems, and to recommend ways for the private sector to participate in the development and growth of reservation economies. The Commission was further charged with the responsibility for advising the President on actions required to create a positive environment for the development and growth of reservation economies.

This mandate with its agenda for action and its emphasis on self-determination, self-government and economic development was a major change from past vacillating Indian policies. There has been a long succession of failed or discredited policies that have had disastrous effects on Indian tribes and Indian people. The major historical policies may be described as follows:

Trade Restrictions

Early policy positions of the United States limited relations between Indians and non-Indians by regulating and restricting trade. The Northwest Ordinance of 1787 established a framework for settlement beyond the Alleghenies by asserting that Indian "land and property shall never be taken from them without their consent ...they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs done to them, and for preserving peace and friendship with them." In the United States Constitution, Article 1, Section 8, it is stated that "the Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with Indian tribes." Four temporary Indian trade and intercourse acts were passed during the decade 1790 to 1799 (Acts of 1790, 1793, 1796, 1799.) Permanent trade and intercourse acts were passed in 1802, and 1834. Despite these trade restrictions, exploitation of Indians through trade was one of the major causes of conflict between Indians and non-Indians on the western frontier.

Forced Removal

When trade restrictions proved ineffective in maintaining peaceful relations between Indians and their neighbors, proposals for removing the Indians to unsettled lands west of the Mississippi River began to surface. This served the double purpose of making available vast areas of land for settlement and of solving the problem of conflict of authority caused by the presence of Indian nations within state boundaries. The first removal of Indians and exchange of land treaty was concluded in 1817. For the next 30 years Indian treaty making was concerned almost solely with removing certain tribes from their eastern homelands to the western wilderness.

Congress incoporated these forced removal elements from treaty making in the Indian Removal Act of 1830. Under the removal legislation, and the treaties from this period, most of the Five Civilized Tribes--Cherokees, Chickasaws, Choctaws, Creeks and Seminoles--were taken from their homes in the southeastern states and marched along the infamous "Trail of Tears" to a new Indian territory, now the state of Oklahoma. Indian tribes from the northeast and Great Lakes region were also subjected to the removal policy. The forced removal policies were justified, in part, based on the ideal that Indians should be protected from repeated depredations by settlers. Probably 100,000 Indians were resettled as a result of the different removal policies. A major flaw, however was that Indians could not be removed far enough or fast enough to stay out of the path of the ever-advancing settlers.

Reservations

As the settlers forged their way westward, another form of removal was incorporated into treaties made with tribes. This was the establishment of reservations. In 1867 and 1868 the Indian Peace Commission negotiated the last of the 370 treaties made between tribes and the United States. These final treaties required tribes of the upper great plains, the southwest and the northwest to settle on various reservations. The last treaty, entered into with the Nez Perce of Oregon on August 13, 1868, removed that tribe to a reservation in Idaho.

However, the reservation system, even for those Indians who acquiesced to it, contained many destructive elements. It made Indians wards of the federal government. Traditional leaders of the tribe were by-passed and made ineffective. The possibility and the need of providing their own food, clothing and shelter was taken from the reservation Indians. While there were some meager efforts of "reservation development," no significant system of economic and cultural protection was created to permit Indian tribes to achieve economic viability and independence. There was also forced breakdown of tribal traditions and native religious practices.

Land Allotment/Assimilation

The General Allotment Act was passed in 1887. Its intent was to break up tribal land holdings, allot small parcels of 40 to 160 acres to Indian families or individuals, and eventually assimilate the Indian farmers into the larger community. Subsequent allotment acts also offered citizenship status with the acquisition of land as an incentive to get Indians to participate in the allotment process. Some Indians became citizens this way, but it was not until 1924, when Congress passed the Indian Citizenship Act, that United States citizenship was conferred upon all Indians and Alaska Natives.

The allotment policy became a problem for the nation's tribes. In the nearly 50 years of the allotment period, Indian land holdings were reduced from more than 136 million acres in 1887 to less than 50 million acres in 1934, when the policy was abandoned completely. The 1928 Meriam Report, "Problems of Indian Administration", contained the following appraisal:

> "When the government adopted the policy of individual ownership of the land on the reservations, the expectation was that the Indians would become farmers ... as if the government assumed that some magic in individual ownership of property would in itself prove an educational, civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction. Individual ownership, in many instances, permitted Indians to sell their allotments and to live for a time on the unearned income resulting from the sale."

However, part of the motivation for such land sales lay in the lack of capital by the Indians so that they could farm the land or acquire livestock for ranching or mixed farming. In order to survive, many allottees were forced to sell their lands.

Revival of Tribal Organizations

The Indian Reorganization Act of 1934 ended the allotment period and its attempts to dismantle traditional tribal groups. The IRA initiated efforts by the federal government to impose constitutional forms of government on tribes, and to work with tribes for the improvement of living conditions on reservations. Tribes were told that if they adopted the hastily mimeographed constitutions, drafted by the BIA, funds would be forthcoming to support economic development through the corporate charters which were also statutorily imposed. The Bureau of Indian Affairs provided a continuing role for itself by writing approval authorities into the tribal constitutions. Access to capital was not forthcoming, but continuing control by BIA was constitutionalized and made a part of each adopting tribe's organic law.

Termination

Efforts to terminate the special federal relationship of Indian tribes with the United States culminated in 1953 with passage of House Concurrent Resolution 108, adopted by both the House and Senate. This resolution stated that it was the policy of Congress "to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are acceptable to other citizens." Subsequent termination acts passed between 1954 and 1962 terminated 109 Indian tribes, bands and rancherias.

Federal legislation between 1973 and 1980 restored six of the terminated tribes and four of the California bands to federally recognized status. As had been the case with prior national Indian policies, termination failed in its attempt to come to grips with the problems facing American Indians.

Relocation

Efforts by the federal government in the 1950's to relocate Indians away from the reservations coincided with the termination policy. A Congressional report in 1954 entitled, "Survey Report on the BIA" generalized that "most of the reservations are overpopulated and could not support the populations at anything approaching a reasonably adequate standard of living." Rather than seeking a way to make the reservations financially secure places to live, the federal government chose to follow a simpler approach to the population/resource imbalance--relocation of Indians away from the reservations. Thinning out the populations of the reservations, however, did not solve the reservation's economic problems.

Self-Determination

In the 1960's, Indian tribal groups, like other minority groups, began assuming a more active role in their own socio-economic programs and in the shaping and implementation of federal governmental programs. Increased participation and involvement in matters affecting Indian communities stimulated the announcement in 1970 of a new policy of Indian self-determination. President Nixon's policy statement said: "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." The policy rejected both the termination policy and governmental paternalism, going on to say: "We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of federal control without being cut off from federal concern and federal support." The policy was enacted into law through passage of the Indian Self-Determination and Education Assistance Act of 1975.

Self-Government and Economic Development

President Reagan, in his January 24, 1983 American Indian policy statement, endorsed the concept of self-determination and initiated a process to give it meaning. A copy of the policy statement is contained in this report.

The President indicated that there had been more rhetoric than action in the implementation of the self-determination concept. His policy statement pointed out that:

> "Instead of fostering and encouraging self-government, federal policies have, by and large, inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources and promoted dependency rather than self-sufficiency."

The President also called for actions to clarify the legal privileges of the tribal governments and to give them the tax status of states and other local governments.

An important portion of the President's policy statement is devoted to the development of Indian reservation economies, because "without sound reservation economies, the concept of self-government has little meaning." The President noted that Indian leaders had identified economic development as their number one priority.

Establishment of the Commission

The President issued Executive Order 12401 on January 14, 1983, which established the Commission. A copy of the Executive Order is contained in this report.

The Commission consists of nine members, Indian and non-Indian, appointed by the President from the private sector, reservation tribal government and the federal government. An Indian representative and a non-Indian representative were appointed as Co-Chairmen.

The functions of the Commission were laid out as follows:

(a) Advise the President on what actions should be taken to develop a stronger private sector on federally recognized Indian reservations, lessen tribal dependence on federal monies and programs, and reduce the federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established federal policy of self-determination, and the federal trust responsibility.

(b) Define the existing federal legislative, regulatory and procedural obstacles to the creation of positive economic environments on Indian reservations.

(c) Identify and recommend changes or other remedial actions necessary to remove these obstacles.

(d) Define the obstacles at the state, local and tribal government levels which impede private sector investments on reservations.

(e) Identify actions which these levels of government could take to rectify the identified problems.

(f) Recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

The Executive Order was amended September 21, 1983, to extend the Commission's term through the end of 1984 and call for the final report to be submitted to the President and the Secretary of the Interior by November 30, 1984. A Charter which further elaborated the functions of the Commission and which made provision for administrative and budgetary support was issued by the Secretary of Interior on October 6, 1983.

The Commission was authorized to conduct hearings, interviews and reviews and to confer with Indian tribal government officials and tribal members, private sector business officials and managers, and other parties dealing with matters pertaining to the Commission's mission. Executive agencies were called upon to provide the Commission with such information as necessary for the effective performance of its duties.

COMMISSIONER BIOGRAPHIES

Robert Robertson (Co-Chairman)

Mr. Robertson is Vice President of the Occidental International (Petroleum Corporation.) He has been active in Indian affairs for many years. He is from Carson City, Nevada, and was Executive Administrator to Governor (now U.S. Senator) Paul Laxalt. In 1969, he was appointed to head the National Council on Indian Opportunity under the auspices of the Vice President's office during the Nixon Administration. Later, he served as special assistant to Secretaries of the Interior, Rogers C.B. Morton, Stan Hathaway and Thomas Kleppe. Mr. Robertson earned his Bachelor's degree from Georgetown University and pursued supplemental studies at John Carroll University in Cleveland Ohio.

Ross O. Swimmer (Co-Chairman -- Cherokee)

Mr. Swimmer is Principal Chief of the Cherokee Nation of Oklahoma. He is active in national Indian organizations and currently serves as the Vice Chairman of the Council of Energy Resource Tribes (CERT). He is strongly committed to the preservation of tribal culture and heritage, and is involved with Tribal and State Historical and Educational Societies. He is a Director of the Inter-Tribal Council of the Five Civilized Tribes and serves on several state and local boards and commissions. He is a member of the Oklahoma and American Bar Associations. Mr. Swimmer earned a Bachelor's degree in Political Science and a Juris Doctor from the University of Oklahoma.

Daniel Alex (Athabascan)

Mr. Alex is the head of Eklutna Utilities, Inc. and ERCO, Inc., a construction company. Mr. Alex has, since its inception, been involved in matters concerning the Alaska Native Claims Settlement Act. He has served over twenty different civic and community organizations and is a scientist, mathematician and business executive and served as a geophysicist with the United States Navy. In 1973, he left the Navy to become President of Eklutna Corporation. He is currently President of the Alaska Native Land Managers Association and Chief Executive of Dan Alex and Associates.

Ted Bryant (Cherokee-Choctaw)

Mr. Bryant is the Director of Native American Programs for the firm of Deloitte, Haskins and Sells in the Denver, Colorado office. Prior to this, he operated his own consulting firm specializing in management capacity building. Mr. Bryant was employed by the Department of Housing and Urban Development, Region VIII as assistant to the Director, developing management initiatives for Indian housing authorities. He holds a Bachelor of Science degree from the University of Denver. In 1967, he was elected to the Colorado State Legislature. As a two and one-half term State Legislator, he was dedicated to the advocacy of American Indian matters. Mr. Bryant was appointed Regional Director of the Denver office of the federal agency, ACTION, where he managed a staff of over one hundred people, a multi-million budget and guided the efforts of 9,000 volunteers. Mr. Bryant is an active member of the National Congress of American Indians' Economic Development Committee and is currently president of the American Indian National Republican Federation.

Dr. Manuel H. Johnson

Dr. Johnson is Assistant Secretary of the Treasury for Economic Policy. Prior to his appointment, he was an associate professor of economics in the graduate school at George Mason University, Virginia, and an adjunct scholar of the Heritage Foundation. His research and writing have been concentrated in the area of political economy and public policy. He is the author of three books and has published over 30 articles in such journals as the Wall Street Journal, the British Journal of Industrial Regulations and the Quarterly Review of Economics and Business. He is also co-editor and regular contributor to the international professional publication, Journal of Labor Research. Dr. Johnson was educated at Troy State University, Alabama (B.S., Economics), and Florida State University (M.S. and Ph. D. Economics).

B.Z. Kastler

Mr. Kastler has enjoyed a long and distinguished career in the State of Utah. He is currently serving as Chairman of the Board of one of the State's major fuel suppliers and its subsidiary companies. As an attorney, he joined the Mountain Fuel Supply Company in 1952. Prior to that, he was engaged in the private practice of law. A native of Billings, Montana, Mr. Kastler attended the University of Colorado and graduated Summa Cum Laude from the University of Utah School of Law. He is admitted to practice in Federal courts, the courts of Montana and Utah, and before the Supreme Court of the United States. During 1963-64, Mr. Kastler was a Member of the House of Representatives. He was also Vice Chairman to the Utah Legislative Conference. Mr. Kastler has long been active in civic and business affairs in the Salt Lake area. He served as President of the Salt Lake Area Chamber of Commerce in 1977-78.

David J. Matheson **(Coeur d'Alene)**

Mr. Matheson is Tribal Chairman of the Coeur d'Alene Nation in Idaho. His primary interest as a tribal leader is obtaining a goal of monetary self-sufficiency for his people and in developing his Tribe's human and natural resources. Mr. Matheson served on several tribal committees devoted to researching and planning economic enterprise development. In that capacity, he directed the Tribe's Planning and Natural Resources Division and served as the Economic Development Planner for the Tribe. In addition, he served on the City of Couer d'Alene's Panhandle Area Council, the planning body for northern Idaho's economy. Before returning to the reservation, Mr. Matheson majored in Political Science at the University of Washington where he was head of the American Indian Students Association.

Neal A. McCaleb **(Chickasaw)**

Mr. McCaleb owns an architectural and engineering firm, McCaleb and Associates, in Edmond, Oklahoma. He has held offices in numerous business and civic organizations including the Edmond Chamber of Commerce, Young Men's Christian Association and is presently on the Board of Directors of the Memorial Bank of Oklahoma City. He has also had an active political career. In 1974, he was elected to the Oklahoma State Legislature where he served eight years, four of them as Republican floor leader in the House of Representatives. In 1971 President Nixon appointed him to the National Council on Indian Opportunity. A graduate of Oklahoma State University with a Civil Engineering Degree, Mr. McCaleb belongs to the nation's leading engineering societies.

Walter B. McCay (Cherokee)

Mr. McCay currently serves as an advanceman for President Ronald Reagan, covering his trips in the United States and abroad. Mr. McCay was also the lead advance man for then Governor Reagan between 1976 and 1979. As an international entrepreneur, Mr. McCay spends a great deal of time traveling world wide promoting his many business interests. Based also in Paradise Valley, Arizona, he heads Agricultural Products, Ltd.. He also has major interests in a substantial farming operation and luxury vehicle leasing company. In college, Mr. McCay managed a large chemical enterprise. He belongs to the Entomological Society of America, is a past president of Sigma Chi Alumni Association and is a member of several agricultural associations in California and Arizona.

COMMISSION STAFF

Dr. Frank Anthony Ryan, Executive Director
Eric Rudert, Deputy Director
Jerry Muskrat, General Counsel
Louis G. Sleeper, Counselor for Special
Economic Initiatives

Daphne Berwald
Jacquelyn M. Dean
Pamela DeRensis
Sandra Gjelde
Ian Hawkins
Janice Kekahbah
Mona Merrill
Michele Peralta
Barbara Simms
Corrine Skye

The following people are listed with their respective Agency heading, as they were on detail or loan to the Commission for a specific period of time.

Department of Agriculture
Dr. William Carmack

Department of Education
Dr. Jerald Levine
Lennie Pickard
Dr. Frank Anthony Ryan
Victoria Thornton

Department of Health and Human Services
Indian Health Service
Anne Kendall

Department of Housing and Urban Development
Tanna Chattin

Department of the Interior
Samuel Goodhope
Janet Johnson
Dan McGuire
Judy Moy
Jerry Muskrat
Meridith Stanton
Willie Taylor

Department of Labor
Eric Rudert

Small Business Administration
Deborah Diggs

COMMISSION STAFF -- continued

Department of State
(Trade and Development Program)
Louis G. Sleeper

Department of the Treasury
Dave Peterson

Other Organizations:
National Consumer Cooperative Bank
David Kirker

United South and Eastern Tribes
John Murphy, Intern

Intern
American University
Eric Ertman, Law Student

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 14, 1983

Executive Order 12401

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PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

By the authority vested in me as President of the United States of America, and in order to establish, in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), an advisory commission to promote the development of a strong private sector on Federally recognized Indian reservations, it is hereby ordered as follows:

Section 1. Establishment. (a) There is established a Presidential Commission on Indian Reservation Economies.

(b) The Commission shall be composed of no more than nine members, who shall be appointed by the President from among the private sector, reservation tribal governments, economic academicians, and Federal employees.

(c) The President shall designate a non-Indian representative and an Indian representative to serve as cochairmen of the Commission.

Sec. 2. Functions. (a) The Commission shall advise the President on what actions should be taken to develop a stronger private sector on Federally recognized Indian reservations, lessen tribal dependence on Federal monies and programs and reduce the Federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established Federal policy of self-determination and the Federal trust responsibility.

(b) The Commission will focus exclusively on the following items, and not on new Federal financial assistance:

(1) Defining the existing Federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments on Indian reservations.

(2) Identifying and recommending changes or other remedial actions necessary to remove these obstacles.

(3) Defining the obstacles at the State, local and tribal government levels which impede both Indian and non-Indian private sector investments on reservations.

(4) Identifying actions which these levels of government could take to rectify the identified problems.

(5) Recommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

(c) The Commission should review studies undertaken in the last decade to obtain pertinent recommendations that are directly related to its mission.

(d) The Commission shall, unless sooner extended, submit a final report to the President and to the Secretary of the Interior within six months after appointment of the last Commissioner, or by September 30, 1983, whichever comes earlier.

Sec. 3. Administration. (a) The heads of Executive agencies shall, to the extent permitted by law, provide the Commission with such information as may be necessary for the effective performance of its functions.

(b) Members of the Commission may receive compensation for their work on the Commission. While engaged in the work of the Commission members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service (5 U.S.C. 5701-5707).

(c) The Secretary of the Interior shall, to the extent permitted by law and subject to the availability of funds, provide the Commission with such administrative services, funds, facilities, staff and other support services as may be necessary for the effective performance of its functions.

(d) The Commission will meet approximately 15 times at the call of the chairmen. All meetings of the Commission and all agenda must have prior approval of the chairmen.

(e) In carrying out its responsibilities, the Commission is authorized to:

(1) Conduct hearings, interviews, and reviews at field sites, or wherever deemed necessary to fulfill its duties.

(2) Confer with Indian tribal government officials and members, private sector business officials and managers, and other parties dealing with matters pertaining to the Commission's mission.

Sec. 4. General Provisions. (a) Notwithstanding the provisions of any other Executive order, the responsibilities of the President under the Federal Advisory Committee Act, as amended, except that of reporting annually to the Congress, which are applicable to the advisory commission established by this Order, shall be performed by the Secretary of the Interior, in accordance with the guidelines and procedures established by the Administrator of General Services.

(b) The Commission shall terminate 60 days after it transmits its final report to the President, or on December 31, 1983, whichever comes earlier.

THE WHITE HOUSE,
January 14, 1983.

RONALD REAGAN

Federal Register
Vol. 48, No. 186
Friday, September 23, 1983

Presidential Documents

Title 3—

The President

Executive Order 12442 of September 21, 1983

Presidential Commission on Indian Reservation Economies

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), it is hereby ordered as follows:

Section 1. Section 2(d) of Executive Order No. 12401 is hereby amended to provide as follows:

"The Commission shall submit its final report to the President and the Secretary of the Interior by November 30, 1984."

Sec. 2. Section 4(b) of Executive Order No. 12401 is hereby amended to provide as follows:

"The Commission shall, unless sooner extended, terminate 30 days after it transmits its final report to the President.".

Ronald Reagan

THE WHITE HOUSE,
September 21, 1983.

[FR Doc. 83-26242
Filed 9-22-83; 11:28 am]
Billing code 3195-01-M

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 14, 1983

FACT SHEET

Indian Policy Statement

SUMMARY

Strong and effective tribal governments are essential in the fight to solve the economic, health, educational, social and other problems of some 735,000 American Indians living on or near reservations. Just as the Federal government deals with States and local governments in meeting the needs of other citizens, so should the Federal government deal with tribal governments in promoting the well-being of American Indians.

The President's Indian Policy Statement emphasizes the Administration's commitment to encourage and strengthen tribal government as called for by President Nixon in 1970 and by Congress in the Indian Self-Determination and Education Assistance Act of 1975. The 1970 policy and 1975 law have not been adequately implemented because the Federal government has inhibited the political and economic development of the tribes. Excessive regulations and self-perpetuating bureaucracy have stifled tribal decisionmaking, thwarted Indian control of reservation resources, and promoted dependency rather than self-sufficiency.

This Administration will reverse this trend by removing obstacles to self-government and by creating a more favorable environment for development of healthy reservation economies. This policy recognizes the diversity of the tribes and the right of each to set its own priorities and goals, and to proceed at its own pace. At the same time, the Federal government will continue to fulfill its traditional responsibility for the physical and financial resources held in trust for the tribes and their members.

Indian tribes are tribal governments because they retain all aspects of their original sovereignty not otherwise given up or taken away by Congress. There are 283 Federally-recognized tribal governments in the United States. In addition, there are 193 Alaska village organizations which are served by the Bureau of Indian Affairs (BIA). According to figures released by the U.S. Census Bureau, there were 1,418,195 American Indians, Eskimos and Aleuts in the United States in 1980.

more

(OVER)

MAJOR POLICY POINTS

-- The Administration will deal with Indian tribes on a government-to-government basis.

-- Tribal governments will be strengthened through these actions:

* Today's signing of H.R. 5470, the Indian Tribal Governmental Tax Status Act. This legislation provides tribes with essentially the same treatment under Federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

* Encouragement for tribes to assume responsibilities for sevices such as the enforcement of tribal laws, developing and managing tribal resources, providing health and social services, and education.

* Designation of the White House Office of Intergovernmental Affairs as liaison for tribes. By moving this function from the White House Office of Public Liaison, the President recognizes that tribal organizations are governments rather than interest groups such as veterans, businessmen and religious leaders.

* A request that Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments.

* Request that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the Federal-tribal relationship. The Administration wants this lingering threat of termination withdrawn and replaced by a resolution expressing its support of a government-to-government relationship.

* Support for direct funding to Indian tribes under Title XX social services block grants to States. In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the States consolidated dozens of categorical Federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive Federal regulation, and provide for more local control. This Administration proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

CHARTER

PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

1. The official designation of the Commission is the Presidential Commission on Indian Reservation Economies.

2. The purpose of the Commission is to advise the President on what actions should be taken to develop a stronger private sector on federally recognized Indian reservations, lessen tribal dependence on federal monies and programs and reduce the stifling federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established federal policy of self-determination and the federal trust responsibility. Other related issues, regardless of their importance, should not be allowed to dilute the Commission's efforts. The Commission will focus exclusively on the following items, and not on the new federal financial assistance:

   (a) Defining the existing federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments on Indian reservations.

   (b) Identifying and recommending changes or other remedial actions necessary to remove these obstacles.

   (c) Defining the obstacles at the State, local and tribal governmental levels which impede both Indian and non-Indian private sector investments on reservations.

   (d) Identifying actions which these levels of government could take to rectify the identified problems.

   (e) Recommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

3. The Commission should review studies undertaken in the last decade to obtain pertinent recommendations that are directly related to its mission.

4. It is expected that the Commission will complete its work no later than the last day of November, 1984.

5. The Secretary of the Interior shall, to the extent permitted by law and subject to the availability of funds, provide the Commission with such administrative services, funds, facilities, staff and other support services as may be necessary for the effective performance of its functions.

6. The duties of the Commission are advisory in nature in accordance with this document.

7. The estimated operating cost of the Commission is approximately $865,000, only $400,000 of which shall come from Department of Interior appropriations. The Commission's work will necessitate approximately 5 staff-years of support.

8. The Commission will meet approximately monthly at the call of the chairmen. All meetings of the Commission and all agenda must have prior approval of the chairmen. Pursuant to Section 10 (e) of the Federal Advisory Committee Act, the Commission shall obtain the advance approval for any meeting from a federal employee who has been designated to exercise the powers under Section 19(e) and (f) of such Act.

9. The Commission shall submit a final report exclusvely to the President and the Secretary of the Interior through the Cabinet Council on Human Resources.

10. Members of the Commission appointed from among non-government employees may receive compensation, travel and per diem expenses for each day such member is engaged in the work of the Commission. Travel and per diem reimbursement shall be up to a daily rate in accordance with the Federal Travel Regulations.

11. In carring out its responsibilities, the Commission is authorized to:

    (a) conduct hearings (swearing in witnesses as appropriate), interviews, and reviews at field sites, or wherever deemed necessary to fulfill its duties.

    (b) confer with Indian tribal government officials and managers, and other parties dealing with matters pertaining to the Commission's mission.

12. The co-chairman or their designee shall be the official spokespersons for the Commission for contact with the Congress, public, media, and others.

The Commission shall terminate 30 (thirty) days after it transmits its final report to the Cabinet Council on Human Resources, or on December 31, 1984, whichever occurs earlier.

(signed)
SECRETARY OF INTERIOR

Ocotber 6, 1983
Date Filed .

II RECOMMENDATIONS OF THE COMMISSION

INTRODUCTION TO THE RECOMMENDATIONS

The Presidential Commission on Indian Reservation Economies proceeded upon the assumption that Indian reservation economies were an integral part of the national economy and not distinctly separate third world economies. In conducting its study on Indian reservation economies, therefore, it did not explicitly rely upon theories such as: traditional economic development theory of lesser developed countries, the Rostow linear stages model, the Harrod-Domar growth model, the Marxist neo-colonial dependence model, the false paradigm model, or even the Dualist model, as sources to explain Indian reservation underdevelopment. The Commission avoided presupposing a "model modernized society" as a standard for either approximation or comparison. Moreover, it did not believe that mail-order models or solutions, complete with their rates, routes and time-tables, would be sources for fertile recommendations. The Commission recognized that no Indian tribe or nation can simply import an Industrial Revolution from without, unpack it like a piece of machinery, and then set it in motion.

From the beginning, the Commission approached the problem of studying Indian reservation economic underdevelopment empirically and deductively. It sought to learn what the obstacles were that adversely affected competitive returns to land, labor and capital, as they were factored into an economic production function. As witness after witness testified before the Commission, certain problems began to emerge over and over again. These problems began to take shape and to develop a character of their own. There were 2,320 individual obstacle identifications, which, when grouped according to factor, function and attribution (See Methodology) emerged into 40 major obstacles.

The Presidential Commission on Indian Reservation Economies made five sets of recommendations: Development Framework, Capital Formation, Business Development, Labor Markets and Development Incentives. Within each set, one or more specific recommendations can be found. It is apparent from reading the narrative to each set of recommendations that the Commission views economic development as a multi-dimensional process, affecting major functional aspects of an Indian society's economy, polity, religion, community, education and family structure.

The processes of social and economic transformation necessary to make Indian reservations viable areas of economic growth will require whole-hearted commitment to change by all levels of government. The Federal-Indian relationship needs to mature beyond that of benign paternalism to that of a federalist partnership. Indian tribal governments need to exercise sovereign responsibility and to select development policies which make it possible for individual Indians to succeed in business. The recommendations which follow, however, recognize that the real motivating power of change must come from the Indian people and from their leadership. The direction and pace at which change proceeds should be determined, not by the federal government, but by the Indian people.

DEVELOPMENT FRAMEWORK: INTRODUCTION

The social and economic processes of transforming an economy encompass more than approaches to increasing per capita income, savings and investment ratios, or economic integration. An environmental framework favorable to economic development needs to be articulated. This is vital in order to break out of that process of circular and cumulative causation which sees low productivity leading to low incomes, low incomes leading to low levels of living, and low levels of living leading to low productivity.

The changes anticipated by the recommendations made in this section contemplate a new Federal-Indian relationship, no longer characterized by paternalism, but imbued with a sense of partnership between the United States and Indian tribal governments. A framework capable of supporting such a new partnership will require a reordering of the ways in which the United States and Indian tribes relate to each other, to new responsibilities, and to new challenges. A modernization of social and political arrangements is needed in order to create a basis from which social and economic self-sufficiency can be built.

There will always be resistance to constructing a social and political framework which is capable of providing incentives and opportunity, and which in parting from the old order, releases the considerable productive capabilities latent in Indian society. Economic development, without subsidy, can be successfully put together only within a new social and economic setting which entails a radical break with the past dependency on the federal government.

REPEAL HOUSE CONCURRENT RESOLUTION 108

On June 9, 1953, Representative Harrison introduced House Concurrent Resolution 108 which provided:

> That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

Senator Watkins who presided over the hearings conducted on Resolution 108 was greatly discouraged by the past failures of federal trusteeship, commenting "I think we have been operating now in many cases over 150 years as guardians of some of these Indians, and I do not think we can point with any degree of pride to what we have accomplished."

The statement of termination policy required implementing statutory authority, which followed, terminating 109 tribes, bands, rancherias; affecting 11,466 Indian individuals and 1,362,155 acres of land. Indians who supported the Resolution and subsequent Acts did so because they desired their distributive interest of tribal assets, wished freedom from government control and regulation, wanted their property removed from trust in order to obtain mortgages, and felt that tribal ownership was socialistic or communistic.

The majority of tribes did not support House Concurrent Resolution 108 and their resistance to its statement of policy stiffened when successful tribes which had been terminated, began to suffer from its disastrous effects. H.R. Rep. NO. 604, 93d Cong., 1st Sess. 4 (1973) reported in relation to the Menominee termination plan:

> This plan brought the Menominee people to the brink of economic, social and cultural disaster. The sawmill operation, which supported the tribe and most of the Federal services prior to termination, is now only marginally successful. Menominee Enterprises, Inc., saddled with a huge corporate indebtedness, a difficult management scheme, and high county and state taxation, is on the verge of bankruptcy.

Following upon the termination acts and the long delays at implementation were a plethora of law suits to clarify the meaning of termination. The failure of Congress to repudiate House Concurrent Resolution 108 continued to instill fear in Indian tribes, in spite of President Nixon's message on "Self-Determination Without Threat of Termination," and passage of the Indian Self-Determination and Education and Assistance Act.

The Reagan Administration realized that fear of termination was crippling Indian initiative. Tribes feared success where success spelled termination. In his January 24, 1983 American Indian Policy statement, the President said:

> In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

In creating the Presidential Commission on Indian Reservation Economies, the President acknowledged the long standing problem of federal administration of Indian affairs, noting that the federal government itself was a major obstacle to Indian economic advancement.

In order to assure Indian tribes that the penalty of success is not termination, th Reagan Administration has affirmed the Federal-Indian relationship. Repudiation by Congress of Resolution 108 would encourage tribes to take the risks and make the decisions they need to make in order to build their local economies, achieve autonomy and minimize their dependence on the federal government. Repudiation is an assurance that they can undertake the process of modernizing their government, privatizing business, and actually working their way free of federal dependence secure in the knowledge that support will be there when and if they fail.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS:

THAT THE CONGRESS OF THE UNITED STATES ACT TO REPEAL HOUSE CONCURRENT RESOLUTION 108.

MODERNIZATION OF TRIBAL GOVERNMENTS

Indian tribal governments are possessed of limited attributes of sovereignty and have been accorded political and governmental recognition by all branches of the United States government. There are 227 officially approved Indian organizations pursuant to federal statutory authority under the Indian Reorganization Act, Oklahoma Indian Welfare Act and the Alaska Native Act. In addition to these, there are 56 Indian organizations which have not been established pursuant to any specific statutory authority but which have been officially approved by the Bureau of Indian Affairs. A third category of traditional Indian organizations also exists, which have organized and been recognized, although the Bureau of Indian Affairs has not formally approved of their organizational structure. There are 204 Indian organizations in this category. In sum, 487 Indian organizational entities are recognized by the Bureau of Indian Affairs. Of this number only 135 Indian organizations have been established under the Indian Reorganization Act.

The social and economic characteristics among the 487 Indian tribal governments vary widely, making the notion of model constitutions troublesome. In general, there are more non-Indians living within the borders of Indian reservations than there are Indian residents. Approximately 35% of all Indian reservations and Alaskan villages have fewer than 100 resident members. Less than 15% of all Indian reservations have 2,000 or more members. The high degree of social and economic integration within tribal borders imposes burdens on tribal government functioning. Land and resource ownership characteristics also vary widely. Of the $175 million dollars in royalties, rents and bonuses from mineral leases on Indian lands, the majority went to Council of Energy Resource Tribes which constitute fewer than 10% of the nation's Indian organizations. In addition, the distribution of grazing lands, farm lands, irrigable lands, timber lands, fisheries and water resources are such that wealth is not evenly distributed among the Indian organizations.

In order to deal more effectively with the demands which de facto social and economic integration impose on tribal governments and in consideration of the substantial differences among Indian reservations and their tribal governments, Indian tribes need to modernize their systems of governance.

Generally speaking, Indian tribal governments are hindered in their pursuit of economic and business development by their antiquated or inappropriate political structures. Moreover, their failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. Similarly, the penchant of tribal councils to operate by "resolution" rather than by "ordinance" has the effect of politicizing executive administration, particularly where the chairman-executive is also an elected member of the council. The overlap in authorities undermines stable functioning of tribal government.

The confusion of tribal powers extends to a confusion of governmental and corporate functions as well. Businesses have different goals from governments. The failure to separate governmental from corporate functions results in a confusion of goals. Using tribal enterprises as instruments of political patronage contributes to their failure. Siphoning away investment capital from tribal businesses weakens the capacity of business to expand. A major cause of tribal business failure lies in the confusion over governmental and corporate roles.

In order to minimize risks attendant to tribal government instability and to promote due process of law for those who live and do business within an Indian reservation, the rule of law also needs to be strengthened on Indian reservations. Consistent with the government-to-government relationship and principles of federalism, tribal judicial systems should be accorded the same legal status as that accorded to state judicial systems insofar as appellate review to the federal court system is made available. Accordingly, those tribal court decisions which involve statutory or constitutional rights, like those of the respective states, should be appealable to the federal courts. Such an appellate review system would strengthen tribal court systems, enhance guarantees of fairness, and promote greater certainty for business activity. The status of tribal judiciaries would be enhanced and opportunities for comity of judgments would be improved between tribal and state court systems.

Indian reservations vary widely in their social and economic demography, their degree of social and economic integration, their patterns of land and resource ownership, and the appropriateness of their political structures. In approaching the modernization of tribal governments, the great diversity among Indian tribes and their reservations needs to be considered.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS UNDERTAKE A PROCESS OF MODERNIZING THEIR CONSTITUTIONS TO ACHIEVE AN EFFECTIVE SEPARATION OF GOVERNMENTAL POWERS IN WHICH THE TRIBAL JUDICIAL SYSTEM CAN OPERATE WITHOUT POLITICAL INTERFERENCE FROM TRIBAL GOVERNMENT; AND IN WHICH THERE IS AN EFFECTIVE SEPARATION BETWEEN THE TRIBAL EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS UNDERTAKE A PROCESS OF SEPARATING THEIR CORPORATE BUSINESS FUNCTIONS FROM POLITICAL OR MANAGEMENT INTERFERENCE BY TRIBAL GOVERNMENTS.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT LEGISLATION BE PROVIDED FOR APPELLATE REVIEW OF TRIBAL COURT DECISIONS TO THE FEDERAL COURT SYSTEM WHERE CONSTITUTIONAL OR STATUTORY RIGHTS ARE INVOLVED.

REORGANIZATION OF GOVERNMENT SUPPORT SYSTEMS

Bureau of Indian Affairs management of Indian trust resources creates numerous land, labor, and capital obstacles to Indian reservation economic development. In terms of land and resources, incompetent asset management undermines local initiative and raises costs to Indian tribes and businesses. In terms of labor, Bureau personnel are either under-qualified to manage their present responsibilities, or unable to provide expert technical assistance for business development. Moreover, education and training programs are so overcontrolled by the Bureau, that local control of Indian programs and schools is more rhetorical than factual. Training programs are not focused on private sector labor markets. They are generally not cost effective in terms of employment, and the training and counseling bureaucracy consumes more funds on itself than it contracts directly to tribes. In terms of capital, the Bureau's organizational structure, functioning, and operational deficiencies are such that the cost of doing business on Indian reservations is raised considerably when Indian business development is required to involve the BIA. Furthermore, business development is frequently deterred by BIA where its bureaucratic processes are required for approvals. Excessive regulation has compliance and control for its goals. A Byzantine system of overregulation actually deters investment by raising costs, creating uncertainty, and undermining local initiative. Exacerbating the development climate, is the fact that BIA consumes more than two-thirds of its budget on itself, contracting only 27% of its programs to Indian tribes; leaving very little for investment purposes. Inadequate federal funding exists as an identified obstacle to Indian economic development because the system of delivering support to Indian tribes and Native groups is not designed to provide them with the kind of support they need. The system is designed for paternalistic control and it thrives on the failure of Indian tribes.

A reorganization of government systems which focuses on trust responsibility from the perspective of protection, rather than management, which provides a population-resource formula for block grants to tribes, and which acknowledges their rights to manage their own affairs, would provide the right kind of support. The last ten years of Bureau failure at Indian Self-Determination and Education Assistance Act contracting cannot be overcome by entrusting to the Bureau's bureaucracy, the responsibility of reforming itself. Bureau control over budget reallocations and the contract terms of P.L. 93-638 contracting has led to continued domination of tribal social and economic development. Such a governmental reorganization should also provide for continued government operation of programs and basic services where tribes do not wish to participate in block grants or in enhanced P.L. 93-638 contracting efforts.

Legislation creating a new federal agency for supporting Indian tribes and maintaining the federal trust responsibility should also possess the appropriate legal authorities for accessing resource information developed and maintained by other agencies within the federal government. The Bureau of Land Management and the Minerals Management Service are agencies whose authorities should be evaluated for possible transfer of land surveying and resource recordkeeping functions related to federal-Indian lands. A federal agency which provides financial support and trust protection services would reduce the federal presence in Indian affairs. It also would result in the transfer of most appropriated funds directly to tribes and Native groups, and would provide a protective umbrella for tribal government, by making accountability possible through local autonomy.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT IN THE SPIRIT OF INDIAN SELF-DETERMINATION WHICH SEEKS TO STRENGTHEN TRIBAL AUTONOMY, AUTHORITY, AND ACCOUNTABILITY, AND SIMULTANEOUSLY PROTECT INDIAN TRUST RESOURCES AGAINST TERMINATION:

1) LEGISLATION CREATING AN INDIAN TRUST SERVICES ADMINISTRATION WHOSE FUNCTION IS PROTECTION OF INDIAN RESOURCES, RATHER THAN MANAGEMENT OF INDIAN RESOURCES, AND WHICH SHALL:

   A) ADMINISTER A LEGISLATIVELY CREATED FORMULA BLOCK GRANT FOR TRIBES WHICH, ON A VOLUNTARY BASIS, CHOOSE TO PARTICIPATE;

   B) ADMINISTER AN ENHANCED PROGRAM OF INDIAN SELF-DETERMINATION AND EDUCATIONAL ASSISTANCE ACT CONTRACT AND GRANT PROGRAMS, FOR TRIBES WHICH CHOOSE NOT TO PARTICIPATE IN A VOLUNTARY FORMULA BLOCK GRANT;

   C) ADMINISTER FEDERAL PROPERTY TRANSFERS IN SUPPORT OF LOCAL SELF-DETERMINATION INITIATIVES

   D) ADMINISTER A PROGRAM OF ENHANCED TRUST RESPONSIBILITY SERVICES FOR ALL TRIBES, IRRESPECTIVE OF WHETHER THEY PARTICIPATE IN FORMULA BLOCK GRANTS OR ENHANCED CONTRACTING OR GRANT ACTIVITY.

2) THAT THE OVERALL APPROPRIATIONS LEVEL FOR INDIANS NOT BE REDUCED BELOW FISCAL YEAR 1986 LEVELS.

THE PRESIDENTIAL COMMISSION ON INDIAN RESEVATION ECONOMIES RECOMMENDS

THAT INDIAN TRIBES WHICH CHOOSE NOT TO CONTRACT OR PARTICIPATE IN A VOLUNTARY FORMULA BLOCK GRANT PROGRAM, BE PROVIDED WITH CONTINUING PROGRAM SERVICES FROM OTHER APPROPRIATE AGENCIES, WITH THE EXCEPTION OF TRUST SERVICES WHICH SHALL BE PERFORMED BY THE INDIAN TRUST SERVICES ADMINISTRATION.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT LEGISLATION CREATING AN INDIAN TRUST SERVICES ADMINISTRATION PROVIDE FOR THOSE AUTHORITIES OF THE BUREAU OF LAND MANAGEMENT AND MINERALS MANAGEMENT SERVICE WHICH ARE NECESSARY TO CONDUCT LAND SURVEYS AND RESOURCE RECORD KEEPING ON MINERAL AND ENERGY RESOURCE PRODUCTION AND ROYALTIES ON FEDERAL-INDIAN LANDS.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT IN THE INTERIM TO THE CREATION OF AN INDIAN TRUST SERVICES ADMINISTRATION, THE BUREAU OF INDIAN AFFAIRS BE DIRECTED TO EXERCISE ITS TRUST RESPONSIBILITY IN A MANNER CONDUCIVE TO SUPPORTING TRIBAL RESOURCES DEVELOPMENT AND MARKETING, BY EXERCISING ITS AUTHORITIES IN SUPPORT AND IN CONCERT WITH LOCAL EFFORTS AND PRIVATE INITIATIVE.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE SECRETARY OF THE INTERIOR CONSIDER THE MANY PROBLEMS IDENTIFIED BY NATIVE PEOPLE WHICH HAVE DELAYED IMPLEMENTATION OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT; IMPEDED OPPORTUNITIES FOR RESOURCE DEVELOPMENT; CREATED CONFLICTS AMONG STATE AND LOCAL GOVERNMENT, NATIVE CORPORATIONS, AND FEDERAL AGENCIES; AND FRUSTRATED THE EXPECTATIONS OF NATIVE PEOPLE, AS THE DEPARTMENT OF THE INTERIOR MOVES TO RESOLVE IMPLEMENTATION PROBLEMS CREATED BY THE DELAY.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE SECRETARY OF THE INTERIOR CONVENE A SUMMIT CONFERENCE ON WATER RESOURCES FROM AMONG STATE, LOCAL, AND TRIBAL GOVERNMENTS, FOR THE PURPOSE OF ESTABLISHING A MEDIATIVE PROCESS FOR DEALING WITH WATER RIGHTS AND FOR EXPLORING INNOVATIVE APPROACHES TO WATER RESOURCES MARKETING AND WATER RESOURCE DEVELOPMENT.

COORDINATION OF GOVERNMENT SUPPORT SYSTEMS

Approximately twenty programs in many different federal departments and agencies provide various forms of business development assistance to Indian reservations. Unfortunately, different program goals, policies, regulations, procedures, reporting requirements and funding or lending cycles make coordinated use by tribes of these federal resources virtually impossible. Additionally, federal personnel are not in the business of assessing the needs of business. Compliance rather than profitability has been the criterion of success for federally funded projects. Because federal agencies do not coordinate, overlap and fragmentation occur further minimizing the effectiveness of the overall federal effort. Moreover, past efforts at coordination have failed largely because of "turf" conflicts inherent to the federal program system.

Simplified, uniform application procedures for loans and grants with several coordination points could partially address this problem. Also, contract and grant regulations which provide for common administrative cost centers would make more funds available to support business. Common data bases, terminology and definitions would permit more cost effective decision making, and targeting of resources. Agencies should be encouraged to pool funds, particularly technical assistance resources. This could be done by a National Commission on Indian Business Development; additionally, this Commission could also oversee policy implementation and consistency. The Indian Trust Services Administration, as the federal government's primary Indian service agency, would be the logical clearance point for forms and application procedures. Private business organizations could be retained to evaluate how well specific programs address the needs of business development, as well as performing business technical assistance to Indian enterprises.

A major conclusion of the Presidential Commission on Indian Reservation Economies is that the bureaucracy cannot be trusted to reform itself without some kind of instrumentality to track and oversee the change. History abounds with recommendations made by past commissions which only gather dust in libraries. There are also many examples of past public policies becoming institutionalized within the federal government, each with its funded constituency, each with a categorical solution, and each contributing to a distortion of economic reality.

A tracking and monitoring instrumentality, such as a National Commission on Indian Business Development, could oversee the implementation of those PCIRE recommendations accepted by the President and maintain a focus on the bottom line by supporting the creation of a vigorous private sector on Indian reservations and by providing an ongoing and dynamic process for advising on corrective actions. It would seek results rather than the creation of more compartmentalized programs and bureaucracies. Without such oversight, it can only be expected that the bureaucracies will "take corrective action" and "declare victory." Reform would be cosmetic, rhetorical and superficial without White House commitment and systematic follow through. An instrumentality created by Executive Order could oversee specific changes in how the government presently functions with regard to Indian related programs and services. The Commission believes that acting on the recommendations suggested will provide a clear signal to the Indian people that the Administration is seriously pursuing the President's 1983 policy statement on Indian Affairs and of his continuing commitment to providing them with the right kind of assistance.

The recommendations made by the Commission are designed to act positively upon the major obstacles to Indian economic development identified during the work of the Commission. The instrumentality would provide a body to monitor change within government, to enhance federal procurement contracting, to increase Indian Self-Determination Act contracting, and to coordinate the provision of technical assistance services by focusing them on business development.

The National Commission on Indian Business Development should be located within the Executive Office of the President given the many departments which are involved with Indian programs and services. Membership should consist of the Vice President, as Chairman, the Secretaries of Interior, Commerce, Labor and the Attorney General, six Indian leaders and six business leaders. Bipartisan membership from both Houses of Congress should also be considered. The major functions of the Commission should include the following:

a) Track and monitor the implementation and the effects of the recommendations made by the Presidential Commission on Indian Reservation Economies;

b) Prepare a yearly report to the President on the State of the Indian nations;

c) Monitor federal interagency coordination and cooperation in carrying out federal programs, and in collecting pertinent data, relating to Indians;

d) Assure access by Indian enterprises to the federal procurement system, accelerated "638" contracting, and greater use of block grants to Indian tribes;

e) Arrange through federal agencies or otherwise, business and private sector expert assistance to Indian business enterprises, and public administration and management oriented assistance to Indian tribal organizations. Such assistance to include the following:

    1) Feasibility studies and pre-investment assistance;
    2) Brokering and match-making services;
    3) Management training and related assistance;
    4) Technology access and transfer;
    5) Access to financial and capital markets;
    6) Marketing and sales assistance; and
    7) Procurement and contracting assistance.

An improved coordination, and improved quality, will be sought for the more than $2.6 billion of programs and services appropriated annually for Indian programs, and for programs and services which benefit individual Indians. There are nearly twenty programs in a host of departments and agencies which have the goal of providing business and other development assistance to Indian reservations. Many of these programs have a high degree of overlap and fragmentation.

The structure of federal programming, left uncoordinated, is such that its categorical nature makes it difficult for program recipients to succeed. Conflicting program goals, policies, regulations, procedures, reporting and accounting requirements, and funding or lending cycles make it difficult for Indian tribes to succeed at program coordination when the federal government itself is so uncoordinated.

Program directors see compliance, not profitable activity, as the determinant of a successful project. Federal bureaucrats are not fully competent at assessing the needs of business. Expert technical assistance provided or funded by the federal government, rather than being business oriented, tends to focus on how to write successful applications for grant programs, how to comply with grant programs, how to write measurable objectives and report on program success to government bureaucrats, and how to train staff in program operations. Most federal programming is focused more on social, educational, health and welfare needs of Indian individuals than on business development on Indian reservations.

Another compounding factor is that there is no central data bank where one can obtain government-wide information about Indian population, resources, budgets, or economic activities. There are information gaps. Other data are diffused throughout many agencies, which do not share information in a consistent manner. There is a lack of clarity in data collected. The result is that the data base is too weak to permit effective and timely analysis.

These weaknesses of excessive program compliance requirements and inadequate and weak data bases impose burdensome costs on Indian economic activity. The plethora of guidelines, layers of approvals, workshops on compliance, overlapping and inconsistant regulations and multiple record keeping may meet the needs of government and of the bureaucrats, but not of business.

The proposed National Commission on Indian Business Development would provide a mechanism to track and monitor progress, to identify problems, to assess the reasons for major shortfalls, and to lay out new or revised solutions and recommendations for appropriate actions by the executive agencies, by Congress, by tribal organizations, or by the business community. This instrumentality would strive to create a healthy private sector on Indian reservations, shift responsibility and block grants from the federal to the local tribal level, and provide greater responsibility and authority to Indian tribes over their own resources without impairing the trust status. It would also create more jobs through greater participation by Indian enterprises in government procurement, create more jobs through accelerated Self-Determination Act contracting, decrease the need for social welfare dependency and transfer payments, decrease bureaucratic overhead, decrease the need for future federal program outlays due to greater effectiveness and efficiency in the use of funds, and increase federal income taxes from employed Indians and from successful Indian business enterprises. Establishing a National Commission on Indian Business Development would create a voice for "profitability" where there had only been demands for social welfare services.

> THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS
>
> THAT THE PRESIDENT CREATE A NATIONAL COMMISSION ON INDIAN BUSINESS DEVELOPMENT, BY EXECUTIVE ORDER, TO PROMOTE THE DEVELOPMENT OF AN INDEPENDENT AND HEALTHY PRIVATE SECTOR ON INDIAN RESERVATIONS BY OVERSEEING THE ADHERENCE TO RECOMMENDATIONS ADOPTED BY THE PRESIDENT FROM HIS COMMISSION ON INDIAN RESERVATION ECONOMIES, AND BY COORDINATING FEDERAL AGENCY ACTIVITY TOWARD THIS END; THE MEMBERSHIP OF WHICH SHALL BE DRAWN FROM AMONG INDIAN TRIBES, BUSINESS, AND GOVERNMENT; AND WHICH SHALL BE CHAIRED BY THE VICE-PRESIDENT OF THE UNITED STATES.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT FEDERAL AGENCIES COORDINATE ON WAYS IN WHICH TO SIMPLIFY AND MAKE UNIFORM APPLICATION PROCEDURES FOR LOANS AND GRANTS, AND THAT THE INDIAN TRUST SERVICES ADMINISTRATION BE INCLUDED IN THE FORMS CLEARANCE PROCESS.

RATIONALIZATION OF INTERGOVERNMENTAL AUTHORITY

Concurrent legislative jurisdiction by state and local governments, with tribal governments, over non-Indian residents of Indian reservations, and over economic activity on reservations involving non-Indians, have produced significant litigation and jurisdictional conflicts. Disputes of this kind constitute a major source of obstacles to Indian reservation economic development. When businesses believe that there will be dual taxation if they locate on Indian reservations and do business there, they tend to locate along the outside border of a reservation. In spite of White Mountain Apache Tribe v. Bracker, 448 U.S. 160 (1980), denying the state's right to tax a non-Indian business entity doing business with an Indian tribe, there is still widespread ambiguity over the extent to which state taxing power may reach.

In order to minimize the adverse effects of dual taxation on economic activity and to avoid discouraging a partnership among non-Indians and Indians, legal persons residing or doing business within the boundaries of a reservation should not incur the burdens of supporting two sovereigns. Indians and non-Indians, at the discretion of a tribal referendum, should be able to accept the exclusive taxing authority and jurisdiction of an Indian tribe, to the extent that state authority may not also apply. Such acceptance of exclusive tribal taxing authority would also create a responsibility on the part of the tribe to provide necessary public services to all residents within its boundaries.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT LEGISLATION BE INTRODUCED WHICH PERMITS INDIAN TRIBES TO HOLD REFERENDA IN WHICH ALL THE FRANCHISED VOTERS RESIDING WITHIN THE EXTERIOR BOUNDARIES OF A FEDERAL-INDIAN RESERVATION, MAY BY MAJORITY VOTE, ACCEPT THE EXERCISE OF EXCLUSIVE TRIBAL GOVERNMENT TAXATION AUTHORITY AND RESPONSIBILITY FOR THE PROVISION OF PUBLIC SERVICES TO ALL PEOPLE; THE EFFECT OF WHICH REFERENDA SHALL BE TO PREEMPT STATE TAXING JURISDICTION; AND THAT SUCH LEGISLATION NOT LIMIT THE POWER OF TRIBES TO ENTER INTO LOCAL SERVICE AGREEMENTS WITH OTHER UNITS OF STATE OR LOCAL GOVERNMENT.

CAPITAL FORMATION - INTRODUCTION

One of the major obstacles to Indian economic development is "access" to sources of capital by Indian individuals, Indian businesses and Indian tribes. The problem is one of getting capital to the right places. Risk aversion, however, influences the degree of that access. In determining risk, financial institutions must take a number of factors affecting rate of return on investment into account. Unfortunately, there are additional factors raising risk to investment on Indian reservations which are not found off of reservations. Major factors which raise risk or impose additional costs are:

- Trust status of Indian surface and subsurface resources
- Federal regulation and management of those resources
- Public sector management of business activity by Tribes
- State, local, tribal government concurrent regulation

The fact that Indian lands and resources are held in trust by the federal government means that they cannot be flexibly used as collateral for loans from financial institutions which require suitable security. Federal regulation and management of Indian lands and resources, primarily by the Bureau of Indian Affairs, imposes a complex framework of regulatory controls over resource decision making and resource use. These controls exist in treaties, executive orders and statutes and govern specific resources, such as: land, minerals, timber, water, fishing, etc. Since tribes are the major land and resource owners on Indian reservations, they are intimately involved in promoting business development activity. The problem is that the goals of tribal government are different from businesses. Many tribal governments decapitalize their businesses by redirecting retained earnings toward support of tribal government rather than toward business expansion. Tribal governments often compete with individual Indians or Indian businesses rather than providing an environment conducive to their success. State and local governments frequently impose additional regulation and taxation of business activity on Indian reservations, in excess of the public services which they provide.

The Indian reservation environment is regulated and managed by the federal government; it is also regulated, managed, and taxed by state, local and tribal governments. The heavy degree of governmental involvement in business activity, whether it involves trust assets or not, creates an environment hostile to private sector development. The traditional response of the federal government has been to provide capital grant and loan guarantee programs because tribes have had difficulty in accessing private sector capital markets where weak security or additional costs increase risk. While federal capital programs may have provided a substitute capital market to alleviate the security problems which trust status creates, nothing has been done to alleviate the costs which excessive federal, state, local and tribal governments impose.

The recommendations made by the President's Commission on Indian Reservation Economies seek to improve individual Indian, Indian business and Indian tribal access to capital. The recommendations also seek to improve the climate for investment. In deliberating on what recommendations the Commission should make to the President, it considered the degree to which federal trust responsibility operated as an obstacle to Indian reservation economic development.

The trust responsibility of the federal government for Indian lands and resources, presents a difficult dilemma. On the one hand, trust responsibility seeks to protect Indian lands and resources from alienation, regulation, or taxation by states and local governments. The consequences of such protection however, make it difficult to obtain capital because resources held in trust are not subject to foreclosure, and therefore constitute weak security. The unintended consequence is an impairment of the economic development process.

Preservation of the trust relationship is, however, the most important test by which Indian tribes measure Federal-Indian policy. Centuries of dishonor by the United States in fulfilling its duty of care and protection, as set forth in practically every Treaty, have instilled a fear in Indian tribes that is rational, to the extent that there have been historical takings of Indian lands, and irrational, to the extent that such a relationship does impair access to capital resources, thereby impeding efforts toward self-sufficiency.

The President's 1983 American Indian Affairs Policy Statement seeks to uphold the trust relationship. Consistent with the President's policy, his Commission on Indian Reservation Economies has considered numerous alternatives to improving the opportunities for capital formation, consistent with continued maintenance of the federal trust responsibility.

PRIVATE OWNERSHIP OF TRIBAL ENTERPRISES

In the United States, the private sector accounts for about 88% of the gross national product. Private sector capital is the basis for the production of goods and services and is indispensable to economic growth. It is the engine which supports public sector services. A free enterprise system is characterized by private ownership of the means of production and all other kinds of property, and by considerable individual freedom in pursuing economic activities for the sake of personal profit. Private property, individual freedom and the profit motive are basic attributes of the national economic system. By contrast, Indian reservations are characterized by government-run tribal businesses, utilizing tribally held property, and operated in many instances in a not-for-profit manner. In all capitalist systems, governments do play an economic role, but not to the same extent as tribal governments.

Private enterprise includes all economic activities that are independent of government control, or outside of the so-called public sector, that are carried on principally for profit. Also included are those nonprofit organizations which are directed at satisfying private needs, such as private hospitals and private schools. Private enterprise is owned individually, or by groups, as well as the self-employed.

The Private Sector Survey on Opportunities and Constraints, commissioned by the President's Commission on Indian Reservation Economies found that extensive tribal government management and involvement in business development activity contributed to the failure of tribal enterprises. Merely separating the corporate functions of tribal enterprises from interference by tribal government and employing competent management will not achieve a privatization of tribal enterprises capable of offering profit motivation, private property ownership, nor individual freedom.

Private ownership of tribal enterprises contemplates ownership of the means of production, private management, for-profit motivation and freedom for individual Indians or groups of Indians who have or share an interest in participating in business activity on an Indian reservation. Tribes could just as easily lease tribally held assets to their members as they presently do to nonmember businesses which use their resources. Existing businesses could be sold to tribal members, or ownership transferred by way of stock transfers, rather than per capita distributions of corporate retained earnings. Employee stock participation plans could also be offered. There is no one correct approach to privatizing tribal enterprises. There are, however, many possibilities for offering individual Indians incentives. There is no difference between a per capita payment from a tribal enterprise, a judgment fund, a mineral royalty or bonus, and a welfare distribution, where no opportunitiy exists for individual Indians to self-actualize or to succeed through individual effort.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT INDIAN TRIBAL GOVERNMENTS MAKE PRIVATE OWNERSHIP OR PRIVATE MANAGEMENT OF TRIBAL ENTERPRISES AN OBJECTIVE OF THEIR INVOLVEMENT IN BUSINESS ACTIVITY.

SECURITIES REGULATION

The Securities and Exchange Commission is an independent federal regulatory agency created by the Securities Exchange Act of 1934. It administers statutes designed to provide the fullest possible disclosure to the investing public and to protect the interest of both the general public and investors against malpractice in the securities and financial markets. The SEC supervises all national securites exchanges and associations, registers all issues of securities offered in interstate commerce or through the mails, registers brokers and dealers who engage in over-the-counter trading, and regulates mutual funds and other investment companies, investment counselors and advisers, and practically all other individuals and firms engaged in the investment business. The SEC enforces a number of federal laws: the Securities Act of 1933, Public Utility Holding Company Act of 1935, Trust Indenture Act of 1939, Investment Advisers Act of 1940, Investment Company Act of 1940, and the Securities Act Amendments of 1975.

Securities and Exchange Commission statutes and regulations presently exempt states and local governments from registration under the 1934 Securities Act, thereby reducing, significantly, their costs in issuing securities and financing economic development. Since tribal governments are not specifically identified in the statute providing for exemption, Indian tribes will potentially incur higher costs for securities which they issue in private capital markets. Consistent with the President's policy statement recognizing Indian tribes as tribal governments, Indian tribes should be accorded the same treatment as that provided to states and local governments.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT SECTION 3(a)(2) OF THE SECURITIES ACT OF 1933 BE AMENDED TO EXEMPT FEDERALLY RECOGNIZED INDIAN TRIBES FROM SECURITIES AND EXCHANGE COMMISSION REQUIREMENTS TO THE SAME EXTENT THAT STATE AND LOCAL GOVERNMENTS ARE EXEMPT.

INDIAN TAX STATUS

Under the provisions of the Indian Tribal Governmental Tax Status Act of 1982, Indian tribal governments are accorded the same treatment as states or local political subdivisions of states, for purposes of certain sections of the Internal Revenue Code. The Tax Status Act accords tax-exempt treatment status to revenue bonds issued by Indian tribal governments, which are used to support basic infrastructure or community development construction. Industrial revenue bonds which are used to finance business development are not accorded the same treatment.

Industrial development bonds are tax-exempt bonds issued by local governments to attract industrial enterprises. The bond is for a plant nominally owned by the municipal government, but actually secured by the long-term lease of a firm that negotiates with the local government. The business, therefore, has the advantage of lower-cost borrowing on a tax-free bond, and the municipality gets a new industry. Manufacturers also use industrial revenue bonds for pollution control projects.

Industrial revenue bonds which can be used to help finance new businesses on reservations and encourage the development of local reservation industries are not now accorded tax-exempt status by the Internal Revenue Code. Although it is generally recognized that Indian tribes should be accorded similar status to that of states and local governments, the lack of federal exemption for interest paid on industrial revenue bonds places them in an inferior status. President Reagan's 1983 Indian Affairs Policy Statement seeks to treat Indian tribes as governments.

The ability to access pre-existing capital markets through industrial revenue bonds by offering tax-exempt status to interest paid on such bonds would provide tribes with an important means of attracting profitable business expansions and significantly enhance the potential for expanding local business activity.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE INDIAN TAX STATUS ACT BE AMENDED TO PROVIDE INDIAN TRIBAL GOVERNMENTS WITH THE SAME TAX EXEMPTIONS AS THAT PROVIDED TO STATE AND LOCAL GOVERNMENTS.

TRUST FUND INVESTMENT

Price Waterhouse reported that in assessing overall performance of Bureau of Indian Affairs trust fund investment :

> We have found that the BIA Branch of Investments has achieved excellent investment results relative to other managed portfolios operating under similar investment authorizations. These recent successes are primarily attributable to a strategy of investing in short-term assets in the face of volatile interest rates and to the discovery of federal subsidies implicit in the pricing of FDIC and FSLIC insured CD's.

The report also noted a number of trust fund system deficiencies. For example, "...systems supporting BIA's accounting requirements are not designed to support its cash management information requirements, nor would it be practical to modify those systems to provide the data required to enhance the Bureau's cash management function." Cash management and accounting and control system weaknesses were identified as major problems. Adding its own emphasis the report stated: "Thus, there are significant opportunities for BIA to utilize external services."

The present system of trust fund management effectively denies tribes the right to determine their own investment objectives, to choose between investing in a short-term highly liquid portfolio, or in a medium-term wealth maximization portfolio. It also fails to account properly for invested funds.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE BUREAU OF INDIAN AFFAIRS WITH TRIBAL CONCURRENCE, CONTRACT AS MANY OF THE TRUST FUND'S OPERATIONAL AND MANAGEMENT FUNCTIONS AS POSSIBLE, TO PRIVATE FUND MANAGERS, SUBJECT TO FEDERAL LAWS PROTECTING TRUST FUND ASSETS AND INCOME, AND REALIGN THOSE FUNCTIONS NOT CONTRACTED, INTO A MORE EFFICIENT AND EFFECTIVE ORGANIZATION;

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBES ALSO BE OFFERED THE FREEDOM TO CHOOSE BETWEEN INVESTING THEIR FUNDS IN A PRIVATELY CONTRACTED INVESTMENT FUND, OR IN LOCAL FINANCIAL INSTITUTIONS, SUBJECT TO FEDERAL LAWS PROTECTING TRUST FUND ASSETS AND INCOME.

INDIAN VENTURE CAPITAL FUND

Money invested in a new company that shows a potential for fast growth is venture capital. Venture capital investment is characterized by high risk. It doesn't matter how the investment is structured, whether it is an equity investment that generates long-term capital gains, or a high risk loan that gives the venture capitalist a 25% return on his investment. Venture capital differs from finance company capital, which is also higher risk, to the extent that it offers management assistance. Venture capitalists are more involved in the management of businesses than are finance companies. In essence, the venture capitalist is a business partner. As a part of the venture, you get not only capital, but also brain power. Many of the early venture capital funds focused on finding small businesses and helping them to build from the ground up. Rather than pumping up small businesses with large infusions of capital, and then selling out their interests for a quick capital gain, early venture capital funds stayed with the businesses they sought to build.

The Bureau of Indian Affairs' present approach to providing venture capital exists in its Economic Development Initiative which promises 25% equity for business development projects which secure 75% from private sources. The program initiative suffers from government involvement, lack of government expertise in business, weak financial analysis, weak business management assistance, and its focus on tribal government-run businesses, rather than on individual Indian or privatized enterprises.

THE PRESIDENT'S COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT AN INDEPENDENT INDIAN VENTURE CAPITAL FUND(S) BE CREATED WHICH CAN PROVIDE LOANS AND TAKE EQUITY POSITIONS IN PARTNERSHIP WITH INDIAN BUSINESSES, AND WHICH IS CAPITALIZED THROUGH PRIVATE SECTOR SUBSCRIPTIONS, MATCHED ON A LIMITED BASIS BY FUNDS PREVIOUSLY USED TO SUPPORT THE BUREAU OF INDIAN AFFAIRS' ECONOMIC DEVELOPMENT ACTIVITIES.

INDIAN FINANCE ACT

There are many deficiencies in the operation and implementation of the Indian Finance Act. Management and technical assistance as provided for in the Act were not being adequately furnished by the Bureau of Indian Affairs. It was noted in the field hearings held by the Commission that the Bureau of Indian Affairs showed consistent inconsistency in interpreting guidelines and policies. Indian Finance Act operations were characterized by a notoriously poor turnaround time for applications received, a lack of knowledgeable reviewers, a lack of specialized staff, a failure to differentiate first-time borrowers from successful borrowers, and failure to apply profitability criteria to its lending activities.

There is a reluctance throughout the commercial banking industry to deal with Indian reservations because of the unresponsiveness of the BIA with regard to lending guarantees. For example, the regulation and time delays in obtaining BIA guarantees are such that fishing loans for herring season in May are made in August and fishing loans for salmon season in July are made in September.

In addition to these deficiencies, the Bureau of Indian Affairs has used appropriations intended for loans to pay for its own administrative overhead, carrying an overhead far in excess of what a privately-owned financial institution of similar size and portfolio would have.

The deficiencies identified are such that the Commission lacks confidence that the Bureau of Indian Affairs is capable of taking corrective or remedial action, and believes that the only effective course of action is to decentralize Indian Finance Act functions. Permitting financial institutions to make judgments about the profitability of loans recognizes the expertise of the financial community, rather than permitting a government bureaucracy to make judgments where it is uniquely unqualified and employs unrealistic methods of analysis.

THE PRESIDENT'S COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE INDIAN FINANCE ACT BE APPROPRIATELY AMENDED SO THAT PRIVATE FINANCIAL INSTITUTIONS BE PERMITTED TO CONTRACT FOR ADMINISTRATIVE FUNCTIONS AS WELL AS MAKE LOANS, UTILIZE GUARANTEES, ETC., SUBJECT TO ANNUAL APPROPRIATIONS, REVOLVING FUND LIMITATIONS, AND FUND MANAGEMENT BY THE TREASURY DEPARTMENT.

INDIAN LOAN GUARANTY FUND

The Indian Loan Guaranty Fund does not provide for guarantees to underwriters of performance bonds, who insure contractor performance. Moreover, Buy-Indian Act regulations, while providing for Indian preference in contracting, also require performance bonding of Indian contractors. In the area of Surface Transportation Act construction, particularly, and in construction of education, medical, residential, and other public facilities, Indian contractors are passed over because of their inability to meet all of the bonding requirements. As a consequence, substantial construction and other contract employment opportunities are lost by Indian businesses. Moreover the failure of contracting officers to employ a sliding scale, a matter within their discretion, to assessing the degree of bonding required, has resulted in their continued requirement of 100% bond cover.

Providing a performance bond guarantee would have immediate impacts on Indian employment in construction activities and provide an incentive to buyers and procurement agents to purchase goods and services from Indian businesses. The present system operated by the Bureau of Indian Affairs works to the detriment of Indian businesses, who frequently find themselves in competition with the BIA's own highway construction activities. Decentralizing the determination of whether or not a bond should be guaranteed to private underwriters would avoid the unproductive involvement of a government bureaucracy largely ignorant of what performance means.

THE PRESIDENT'S COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE INDIAN LOAN GUARANTY FUND BE AMENDED TO PROVIDE FOR GUARANTEES TO UNDERWRITERS OF SURETY BONDS, TO A MAXIMUM EXTENT OF 50 PERCENT, AND THAT PRIVATE UNDERWRITERS RATHER THAN THE BUREAU OF INDIAN AFFAIRS BE PERMITTED TO MAKE THE UNDERWRITING DETERMINATION.

BUSINESS DEVELOPMENT - INTRODUCTION

ROLE OF TRIBAL GOVERNMENT

In order for successful business development to take place on Indian reservations, there is a need for tribal development, investment, and implementation policies and strategies which are favorable to business development. A. Waterson summarized his experience in "Development Planning: Lessons of Experience," thus:

> The available evidence makes it clear that in countries with development plans, lack of adequate government support for the plans is the prime reason why most are never carried out. Conversely, the cardinal lesson that emerges from the planning experience of developing countries is that the sustained commitment of a politically stable government is the sine qua non for development. Where a country's political leadership makes development a central concern, the people can also be interested through a judicious use of economic incentives. And, although it is never easy to reform administrative and institutional inefficiency, commitment by political leaders is a necessary condition for reform; without it, reform is impossible.

Indian tribes need to rethink what their role should be in economic development. Instead of monopolizing reservation economic activity, the role of encouraging private sector development through tribal development, investment, and implementation policies and strategies, should be given serious consideration. Tribal leadership needs to act to improve the reservation business climate, to exercise sovereign immunity responsibly, and to link tribal public financing of infrastructure to business development activity.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS EXERCISE SOVEREIGNTY IN WAYS WHICH ENHANCE OPPORTUNITIES FOR INDIVIDUAL INDIAN BUSINESSES AND IMPROVE THE CLIMATE FOR PRIVATE SECTOR INVESTMENT BY DEVELOPING POLICIES AND ENACTING MODEL CODES, SUCH AS COMMERCIAL CODES, WHICH MINIMIZE RISKS TO INVESTORS AND WHICH ENCOURAGE PRIVATE INITIATIVE.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS PROVIDE NOTICE THROUGH THEIR LEGISLATIVE PROCESSES THAT THE DEFENSE OF SOVEREIGN IMMUNITY TO SUIT WILL ONLY BE INVOKED IN THOSE CASES WHERE TRUST ASSETS, OR TRUST INCOME NOT EXPRESSLY WAIVED, ARE INVOLVED.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS INVOKE A POLICY OF LINKING CONSTRUCTION OF INFRASTRUCTURE TO PRIVATE SECTOR BUSINESS DEVELOPMENT IN ORDER TO ASSURE THAT DEPRECIATION AND MAINTENANCE COSTS DO NOT CREATE MUNICIPAL OVERBURDEN.

BUSINESS PLANNING, MANAGEMENT, AND TECHNICAL ASSISTANCE

Because business developments are extremely prone to failure in their early years, there is a definite need for tribal governments to be more hard-nosed in evaluating their ideas than they have been in the past. Certain basic questions need to be asked by tribes as a routine part of their planning process.

What kind of business, in an economic sense, will be created?
What will be the size of the business's market?
How marketable is the product that will be sold?
Are the start-up costs commensurate with the long-term prospects?
What will the relationship be between profitability and price?
Can the business be easily explained to potential investors?
What mechanism exists for investors to sell their interests?

A business orientation which focuses on local comparative advantages in relation to production of goods and services, and their markets, needs to be developed. Every Indian reservation has economic advantages to offer, whether or not they are possessed of abundant natural resources. To the extent that human capital is present, the productive employment of labor in the right business activity can be that advantage. A business planning process which seeks to build businesses that are profitable is indispensable to reservation economic development.

It was abundantly clear from the national hearings process that Indian tribes lack business management and business technical capabilities. Tribes do not routinely ask what the most significant risks and problems are in launching business enterprises. They do not assess the long-term prospects for profit, the future financing and cash flow requirements, the demands of operating lead times, seasonality, facilities location, marketing, or pricing strategies. They have traditionally relied upon proposals to government agencies.

Business management and business technical assistance to Indian individuals, businesses, and tribes are greatly needed to avoid the pitfalls of public sector planning and to enhance the probabilities for profitability. An effective business plan, in contrast to a grantsman's proposal, is capable of convincing investors that a growth opportunity has been identified, that the entrepreneurial or management talent is available to exploit the opportunity, and that a believable program for producing profits exists.

Private Indian Business Development Centers, which provide appropriate business management and business technical assistance in such areas as industrial engineering, production design, marketing, finance, etc., could provide no-nonsense sources of assistance. They could assist tribes to prepare business plans on products or services, market research and evaluation, pricing, sales and advertising plans, break-even analyses, assist on product, facilities, management, and organizational improvements; profit and loss forecasting; approaches to capitalization, etc. The provision of expert private-sector-located management and technical assistance, unlike that presently provided by the federal government, could provide the difference between success and failure.

Business planning, management, and technical assistance capabilities need to be acquired or created if Indian reservation economic development is to succeed.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS ENCOURAGE BUSINESS PLANNING ACTIVITY—WHICH MEETS GOALS BOTH OF FINANCIAL PROFITABILITY AND SOCIAL ACCEPTABILITY.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT FUNDS PRESENTLY APPROPRIATED FOR BUREAU OF INDIAN AFFAIRS ECONOMIC DEVELOPMENT ACTIVITIES BE DIRECTED TOWARD SUPPORTING THE CREATION OF PRIVATE SECTOR INDIAN BUSINESS DEVELOPMENT CENTERS WHICH PROVIDE FOR EXPERT PRIVATE SECTOR BUSINESS TECHNICAL ASSISTANCE TO EXISTING AND POTENTIAL INDIAN BUSINESSES.

ENCOURAGING PRIVATE INITIATIVE THROUGH PRIVATE BUSINESS ASSOCIATIONS

Tribal governments should not act in competition with private Indian individuals or private business associations. For example, where the degree of fractionated land ownership is high, undivided interest holders could be encouraged to pool their interests in allotments, and by leasing tribal lands, engage in cooperative farming and ranching. Instead of receiving insignificant lease rentals as they now do, they could benefit from employment and profits. With 60% of Indian lands leased to non-Indian owners, significant potential exists for innovative private business associations to engage in economic activity.

Moreover, tribes need not be the prime promoters of business activity. Indian business development corporations could be created to provide sources of equity or debt financing to private Indian individuals. They, rather than non-Indian lessees, could lease tribal resources and use them in business activity.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBES EXPLORE WAYS OF OVERCOMING THE PROBLEMS OF FRACTIONATED HEIRSHIP LAND, THROUGH INNOVATIVE FINANCING OF JOINT VENTURE RANCHING OR FARMING, WHICH OFFERS INDIVIDUAL UNDIVIDED INTEREST HOLDERS AN OPPORTUNITY TO PARTICIPATE IN OWNERSHIP.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT FUNDS PRESENTLY APPROPRIATED FOR BUREAU OF INDIAN AFFAIRS ECONOMIC DEVELOPMENT ACTIVITIES BE DIRECTED TOWARD SUPPORTING THE CREATION OF INDEPENDENT PRIVATE SECTOR INDIAN BUSINESS DEVELOPMENT CORPORATIONS, THROUGH PROVISION OF LIMITED EQUITY CAPITAL, WHICH CAN SPONSOR OR FINANCE PRIVATELY OWNED INDIAN BUSINESS ENTERPRISES ON OR NEAR INDIAN RESERVATIONS.

LABOR MARKETS - INTRODUCTION

Economists classify markets in terms of their structure, that is, the number and size of economic buyers and sellers, the degree to which products differ from one another, and the ease with which new producers or suppliers can enter a market. The structure of the market determines the amount and kind of competition that will prevail and how prices will ultimately be set. Labor markets are those contacts between buyers and sellers for a given kind of labor. For the majority of jobs, such contacts occur in a relatively small geographic area, limited mainly by the distance people are willing to travel to work. For certain occupations, the labor market can be nationwide. In most cases however, the labor market area consists of a medium-sized or large urban center and the territory surrounding it. About 250 such areas in the United States are considered major labor market areas by the Labor Department's Bureau of Employment Security.

The traditional competitive free market model for labor is characterized by consumer sovereignty, individual utility and profit maximization, perfect competition and economic efficiency with very many "atomistic" producers and consumers, none of whom is large enough to influence prices or wages. The level of employment and the "wage rate" are determined simultaneously with all other prices and factor uses in the economy by the forces of supply and demand.

The problem with the traditional labor market model is that it is not very applicable to the realities of wage and employment determination on Indian reservations. Wage rates are typically not flexible downward since they are largely determined by "institutional" forces, including labor union pressures, legislated government salary scales, and corporate or business hiring practices. There are many more Indian laborers seeking employment at the going wage than there are jobs available. Involuntary unemployment and underemployment are pervasive.

The national labor movement experience is extended to Indian reservations through a host of federal labor laws which do benefit labor, but do not benefit Indian labor in economic activity located within Indian reservation boundaries. Since the structure of labor markets determines the degree of competiton, and that structure benefits organized labor to the detriment of Indian labor, a more effective approach to stimulating local Indian labor markets would be to recognize the rights of Indian tribal governments to exercise their own governmental powers in the regulation of local, reservation based, labor markets. In 1980, there were 106,947 American Indians and Alaska Natives living on Indian reservations or other trust lands located in 27 states, 16-65 years old, who were unemployed and were actively seeking employment. A great many of these Indians were unable to work on construction, mining, and resource development projects located on their own reservations because of federal laws benefiting the importation of outside labor. Considering the small number of unemployed Indians nationally, relaxing the application of federal laws in favor of local tribal governmental regulation would not materially damage organized labor's hold on off-reservation labor markets.

The stereotype of "Indians who don't want to work," is challenged by the fact that federal laws benefiting non-Indian and non-local labor, work against employment of Indians. There is a difference between not wanting to work, and being barred from working.

WAGE RATE REGULATION

The Davis-Bacon Act received much criticism in the national hearings process for its discriminatory impact on Indian contractors and on the local hiring of Indian workers on construction projects taking place on Indian reservations. The main criticism was that it requires workers to be paid the "prevailing wage" for a particular type of work in a particular locality. As the Senate Select Committee on Indian Affairs pointed out, the original purpose of Davis-Bacon, passed during the Great Depression of the 1930's, was to prevent federal contractors from bringing into an area of federal construction out-of-state workers who generally worked for less than the local community workers, thereby undercutting and depressing prevailing local wage scales, demoralizing local labor markets, and disrupting local economic conditions. Yet, it is precisely those unwanted effects which Davis-Bacon has on Indian reservation employment. The direct result of Davis-Bacon is discrimination against the hiring of Indian labor for development projects located on Indian reservations.

The Act was not designed to increase construction wages or to benefit wage rates in an area. Its purpose was to maintain wage and benefit levels already found to prevail in an area. Yet as applied to Indian reservations, where little if any similar precedent-setting construction activity has been performed, the Davis-Bacon wage and benefit rates are often much higher than they would otherwise be. This is due, in large part, to the Labor Department's failure to expend that effort to compute Davis-Bacon rates which are specific to Indian reservations. The Labor Department is supposed to conduct surveys which include all workers, both union and non-union, who are performing similar work in an area. Studies by the General Accounting Office, however, show that the Labor Department uses procedures which often rely upon old data, data from outside of the local area, or which simply use the prevailing union rates in construction. All of these practices discriminate against nonunionized bidders on Indian reservations.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE DAVIS-BACON ACT BE AMENDED TO EXEMPT FROM ITS COVERAGE THOSE FIRMS WHICH CARRY OUT CONSTRUCTION WORK ON INDIAN RESERVATIONS OR TRIBAL LANDS.

LABOR RELATIONS

One of the problems in reservation economic development has been the issue of who receives the scarce number of job opportunities that are created on a reservation. Typically, these jobs are created through the commercial development of a natural resource, or are connected to federal contracts for infrastructure development - roads and housing, for example. Traditionally, off-reservation companies receiving tribal or federal contracts have an existing skilled work force, which is in many cases unionized. By using the union situation, or by insisting on high skill levels (or "qualified" applicants), companies doing reservation business have historically hired few reservation workers. Besides denying Indian workers the opportunity to work on the development of their own resources, this situation also results in inflated wages going to the non-reservation workers. When Indians are hired it is usually in non-management, low-skill-level occupations.

In recent years, tribes have attempted to address employment problems by pushing Indian preference in hiring for work done on reservations. Tribal Employment Rights Offices (TERO's) for example, have been particularly active in promoting such hiring by using predetermined targets negotiated with employers. A major impediment to increasing Indian employment in work done on reservations has been the limited authority of tribes in implementing Indian preference in hiring, particularly in regard to the authority vested in the National Labor Relation Board's (NLRB) jurisdiction over union contractors, with companies having approved collective bargaining agreements.

In the past, the NLRB has held that Indian preference violates the right to collectively bargain under the National Labor Relations Act. The collective bargaining requirement results in union contracts favoring the employment of outside labor, not Indian labor residing within the local Indian reservation labor market. Tribal governments need as many tools as possible in order to help their unemployed gain access to labor markets and to develop experience and skills necessary to participate in local economic development. Legislation, giving Tribal government the option to decide on whether they wish NLRB jurisdiction over matters impinging upon the implementation of Indian preference, would recognize the injustice which NLRB jurisdiction creates in its discriminatory impact on local Indian labor markets.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE NATIONAL LABOR RELATIONS ACT BE AMENDED TO PERMIT INDIAN TRIBES THE OPTION OF EXCLUDING NATIONAL LABOR RELATIONS BOARD JURISDICTION OVER COLLECTIVE BARGAINING MATTERS WHICH DETER INDIAN PREFERENCE IN EMPLOYMENT IN ECONOMIC ACTIVITY ON INDIAN RESERVATIONS.

RIGHT TO WORK

A continuing problem on Indian reservations has been the lack of private sector appropriate skills training, particularly through the on-the-job training process. There is relatively little true private sector development where such skills can be obtained. This lack of opportunity has been further exacerbated in many instances when infrastructure development, primarily through federal contracts, is conducted by firms with union agreements. These union agreements serve to prevent reservation Indian labor from employment in such projects. In addition to not receiving skills training or work experience, and keeping unemployment high, salaries paid to non-reservation workers go off the reservation.

Considering the government-to-government relationship with tribes, they should be allowed the same latitude as states to decide "right-to-work" issues. This decision will allow them the right to determine the role that unions play in their self-determined development process and, if a tribal right-to-work law is adopted, allow individuals the freedom of choice regarding union membership.

Section 14b of the Labor Management Relations (Wagner) Act, popularly known as the Taft-Hartley Act, provides both states and territories the "right-to-work" option. Tribes, which have the same governmental functions as states, can be included under this authority by simple amendment.

PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT SECTION 14(b) OF THE TAFT-HARTLEY ACT BE MADE AVAILABLE AT THE OPTION OF INDIAN TRIBES TO THE SAME EXTENT AND CIRCUMSTANCES AS IT IS TO STATE GOVERNMENTS.

TRAINING

Tribally run skills-training programs have focused on training individuals through employment in tribal government or in tribal government-run businesses, many of which are maintained by federal subsidy. Past general federal policy on public sector employment clearly promoted this use of training resources. Lack of a private sector market on reservations has resulted in individuals receiving training in occupations generally having little relevance to local labor markets. This has resulted in a perception by businesses that reservation Indian labor is "unskilled" for private sector work. Inferior education and high drop-out rates add to the unemployment problem. Unemployment creates negative environments. Indian labor suffers from low self-esteem, alcohol and drug dependency, high delinquency and crime rates, ill health, suicide, despair, and anomie.

An approach to Indian unemployment is the creation of unsubsidized private sector jobs. Training can assist in facilitating this. Tribes should gear their training efforts to private sector labor markets. An assertive effort can be made to attract outside businesses to the reservation, to develop small businesses, and to provide business-oriented training for potential entrepreneurs, rather than concentrating on public service employment as has been done in the past.

Tribes should place greater emphasis on business management training by providing for courses on business management, marketing, finance, etc. Active partnerships with the private sector, on or near reservations, should be sought in order to develop better targeted training plans. Possibly, advisory "Private Industry Councils" could be used. More training off the reservation could be utilized to expose individuals to successful business management operations, through creative use of "try-out employment" concepts.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS FOCUS THEIR TRAINING PROGRAMS ON PRIVATE SECTOR LABOR MARKETS WHERE JOBS EXIST, OR ON PRIVATE BUSINESS DEVELOPMENT ACTIVITY WHICH IS CREATING PRIVATE SECTOR LABOR MARKETS.

DEVELOPMENT INCENTIVES - INTRODUCTION

The potential market demand of federal procurement of goods and services from the private sector, which amounted to some $165 billion in FY 1983, and such preferential procurement instruments as already exist, would appear to offer large opportunities for Indian owned enterprises, both individually and tribally owned. However, testimony from the Commission's public hearings from around the country and analysis of the literature indicate that Indian tribes and firms are encountering difficulty in making federal contracting and procurement work for them in the same way that it is for other small and disadvantaged minority-owned firms, for small businesses, for firms in labor surplus areas, and for enterprises benefiting from mandatory procurement requirements for the Federal Prison Industries and the National Industries for the Blind and the Severely Handicapped.

In the obstacle analysis work of the Commission, the major federal capital obstacle to Indian economic development was identified as federal contract and procurement system weaknesses. The Bureau of Indian Affairs was cited for not effectively implementing its Buy-Indian Act authorities in its contracting and procurement activities and for being unduly restrictive in requiring Indian firms to be 100% owned and controlled by Indians. Note that the Small Business Act only requires 51% ownership for participation by disadvantaged minority businesses in SBA's assistance programs. The more restrictive requirement by BIA limits the ability of Indian firms to obtain capital and access to technical and management expertise by joint venturing with private investors.

The Defense Department was criticized for not implementing its discretionary Buy-Indian authorities, in place since Fiscal Year 1982, for purchases from qualified Indian suppliers of goods and services who could meet the quality, cost and delivery requirements dictated by the Department of Defense mission. The SBA was heavily criticized for its restrictiveness and procedural rigidities which favor minorities, but not Indian tribes or Indian enterprises, and for inconsistency and confusion among different district and regional offices as to the requirements of who is considered to be an Indian, whether tribal enterprises are eligible, how to handle the issue of federal, state or Indian tribal government charters for Indian enterprises, whether to allow non-Indians or non-disadvantaged but experienced businessmen on boards of directors for tribal enterprises, who to include in determining economic disadvantage of an entire tribe, and how "management of daily operations" was to be considered for a tribal enterprise with a salaried professional administrator. The Labor Surplus Areas Program (LSA), which allows federal agencies to set aside contracts for competition among firms which carry out more than 50 percent of the contract in labor surplus areas, was criticized because Indian reservations are not regarded as "civil jurisdictions" for LSA classification purposes.

Such preferential procurement programs do not work in favor of Indian tribes, Indian businesses, or Indian individuals. In spite of bureaucratic road shows, memoranda of understanding, and much touted technical assistance availability, the embarrassing fact is that there is little success that can be identified for Indian businesses in comparison to that enjoyed by other disadvantaged minorities, small business, or firms in labor surplus areas.

To take labor surplus area set asides as an example, in FY 1982, and FY 1983, awards to firms in labor surplus areas exceeded $39 billion each year. However, firms on Indian reservations, which have the highest unemployment rates in the country, are unable to compete for these contracts. The areas chosen for LSA classification are civil jurisdictions, corresponding to an area of local government authority, rather than a metropolitan area or labor market area basis. By this method, federal contracts can be directed to those specific localities with high unemployment rates, rather than to all civil jurisdictions within a metropolitan area. Civil jurisdictions are currently defined as all counties in the United States plus all cities with a population of 50,000 or more. Indian reservations are not currently regarded as civil jurisdictions for LSA classification purposes although they perform the same functions as county and other local governments which are so classified and although they have clearly identifiable land with boundaries. The Bureau of Labor Statistics does not maintain specific updated statistics on Indian reservation unemployment, however, the Bureau of Indian Affairs' annual reservation unemployment statistics could be used for classification purposes. The BIA statistics have been used in the past by the Department of Labor in its implementation of formula allocation job training programs for Indians.

Other identified major barriers to the creation of Indian enterprises as a means towards Indian economic development included inadequate subcontracting, inconsistency among federal procurement regulations, poor loan servicing and monitoring, Davis-Bacon wage requirements which operate to the disadvantage of Indian construction firms and to the employment of Indian workers on construction projects on Indian reservations, and failure to set aside or support the setting aside of manageable procurements for Indian businesses.

It is estimated that current federal contracting with Indian tribes and Indian firms comes to less than two-tenths of one percent of total federal procurement. This minimal amount includes the "638" contracts by the Bureau of Indian Affairs and the Indian Health Service, "Buy Indian" contracting by BIA and IHS, and SBA subcontracts with Indian 8(a) firms. If contracts with Indian firms could be increased each year by one-tenth of one percent of total government procurement, this would add some $200 million in new contracts for Indian enterprises. Such an increment each year would be miniscule in terms of federal procurement and would not present onerous burdens on any single federal agency. A one-tenth of one percent annual increment would be only a small portion of larger annual increases of total procurement so that no business would be taken away from any existing firms or minority or other disadvantaged groups. Such an increase could be easily absorbed by Indian enterprises.

A goal is suggested of a government-wide Indian procurement target of $1 billion over an initial five year period to be achieved through cumulative increments of $200 million per year, starting in FY 1985, as a means of stimulating private sector Indian business development and employment. This goal is consistent with the President's Executive Order 12432 on Minority Business Enterprises which established a $22 billion target in federal contract and subcontract awards to minority firms over the three year period of FY 1983 to FY 1985.

Based upon Bureau of Labor Statistics figures, it is estimated that yearly increments of $200 million in federal procurement contracts to Indian enterprises would result in some 9,000 new jobs within Indian firms and some 3,000 new jobs in businesses supplying parts, materials and services to these Indian firms. This direct and indirect employment impact is estimated to generate some $171 million per year in additional income to the economies of the Indian reservations and the surrounding local communities. It is also estimated that this would in turn generate $19 million additional revenue in federal income tax each year. Sustained increments over the initial five year period would translate by 1989 into 44,000 new jobs in Indian enterprises that year, 15,000 new jobs in surrounding communities, $855 million in resulting wage income, and $94 million in additional federal income tax. Revising or refining future five-year procurement targets should be determined by the proposed National Commission on Indian Business Development.

As a development incentive, the federal procurement opportunity would not require any new federal funds. It would draw upon the budgets of government agencies who already purchase goods and services from the private sector to carry out their government missions. It would not give money to Indians. It would improve the access by Indian firms to the federal marketplace and allow them the opportunity to earn their way. Indian individuals would benefit as would Indian tribes, the surrounding community, and the federal government from decreased welfare payments and increased federal income tax payments.

Each federal agency would be called upon to make use of existing procurement authorities and instruments in seeking to reach government-wide targets for Indian procurement of $1 billion over the initial five year period. Actions would include revision of E.O. 12432 consistent with the intent of the overall procurement recommendations. Other actions would include assigning oversight and reporting responsibility for Indian procurement within the network of the Offices of Small and Disadvantaged Business Utilization created by the Small Business Act, seeking equal access by Indian firms for participation in 8(a) contracting by the Small Business Administration, in small business set-aside contracting, in labor surplus area set-aside contracting, and others as appropriate. Further actions should include effective implementation of the Buy Indian authorities of the Department of Defense, Indian Health Service, and Bureau of Indian Affairs, as well as expanding the scope of the Acts.

The Small Business Administration and other agencies should recognize Indian individuals and tribal enterprises located on Indian reservations or trust lands which have been organized under federal or tribal laws, as well as those off-reservation Indian enterprises which have been organized under state charters. Such recognition is consistent with the President's government-to-government policy statement.

There is also a need to have consistent definitions respecting eligibility of Indians and Indian tribes. The following standard definitions are suggested:

> "American Indian Tribe" means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska native village, or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act) which is recognized by the Secretary of Interior as having special rights and responsibilities, and is recognized as eligible for the services provided by the United States to Indians because of their status as Indians; or is recognized as such by the tribe, band, nation, pueblo or other organized group or community resides."
>
> "American Indian means any person of American Indian descent who is an enrolled member of an American Indian tribe, as defined herein; or, who is a descendant of an enrolled member of a tribe whose tribal rolls have been closed by act of

Congress; or, any Alaska native subject to the Alaska Native Claims Settlement Act."

"American Indian/Alaska Native Business Enterprise means any legal business organization (regardless of business form or activity) that is at least 51% Indian owned, or Indian controlled, by American Indian(s)/Alaska Native(s); which business enterprise may be managed by Indians, or by an agent under its control."

"Moreover, to qualify for Small Business Administration section 8(a) certification, or for Buy Indian Act eligibility, the Board of Directors need not be comprised of more than a majority of Indian members."

"Economically Disadvantaged Indian Tribe shall be determined by the SBA by considering per capita income levels of the Indian tribe, excluding judgment awards; the degree of poverty within the population, and the unemployment rate."

In addition to improving access by Indians to federal procurement opportunities, Enterprise Zones could be additional development incentives. Currently, Indian reservations have very little in the way of private sector economies. In order to assist economically depressed areas, the Administration has proposed the Enterprise Zone Employment and Development Act. This act would designate zones within which major tax incentives and regulatory relief could be offered to stimulate job creation, business growth and physical revitalization. Indian reservations should be an important part of this proposal.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE PRESIDENT'S EXECUTIVE ORDER CREATING THE NATIONAL COMMISSION ON INDIAN BUSINESS DEVELOPMENT PROVIDE FOR A GOVERNMENT-WIDE INDIAN PROCUREMENT TARGET OF $1 BILLION WITHIN FIVE YEARS, TO BE ACHIEVED THROUGH CUMULATIVE INCREMENTS OF $200 MILLION PER YEAR, STARTING IN FISCAL YEAR 1985, FOR THE PURPOSE OF STIMULATING PRIVATE SECTOR INDIAN BUSINESS DEVELOPMENT AND EMPLOYMENT.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE BUY-INDIAN ACTS BE AMENDED TO EXTEND TO ANY TYPE OF FEDERAL PROCUREMENT.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT BUY-INDIAN ACT REGULATIONS BE REVISED TO INCLUDE AS ELIGIBLE ANY INDIAN BUSINESS WHICH IS EITHER MAJORITY INDIAN OWNED, OR HAS INDIAN MANAGEMENT CONTROL, OR ANY BUSINESS WHICH HAS TWO-THIRDS OR MORE INDIAN EMPLOYMENT.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT THE DEPARTMENT OF LABOR REGULATIONS BE REVISED TO INCLUDE INDIAN RESERVATIONS AS SEPARATE "CIVIL JURISDICTIONS" FOR PURPOSES OF DETERMINING LABOR SURPLUS AREAS, FOR LABOR SURPLUS AREA CONTRACT SET-ASIDES.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT INDIAN TRIBES BE DESIGNATED AS ELIGIBLE PARTICIPANTS IN ENTERPRISE ZONES.

Part Two

SCOPE OF WORK

Sections 2 and 3 of the Executive Order creating the Presidential Commission on Indian Reservation Economies set forth the scope of work for the Commission to follow. In relevant part these sections provided:

Section 2. Functions

a) The Commission shall advise the President on what actions should be taken to develop a stronger private sector on federally recognized Indian reservations, lessen tribal dependence on federal monies and programs and reduce the federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established federal policy of self-determination and the federal trust responsibility.

b) The Commission will focus exclusively on the following items, and not on new federal financial assistance:

1) Defining the existing federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments on Indian reservations.
2) Identifying and recommending changes or other remedial actions necessary to remove these obstacles.
3) Defining the obstacles at the state, local and tribal government levels which impede both Indian and non-Indian private sector investments on reservations.
4) Identifying actions which these levels of government could take to rectify the identified problems.
5) Recommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

c) The Commission should review studies undertaken in the last decade to obtain pertinent recommendations that are directly related to its mission.

d) The Commission shall, unless sooner extended, submit a final report to the President and to the Secretary of the Interior....

Section 3. Administration

....

....

c) The Secretary of the Interior shall, to the extent permitted by law and subject to the availability of funds, provide the Commission with such administrative services, funds, facilities, staff and other support services as may be necessary for the effective performance of its functions.

d) The Commission will meet approximately 15 times at the call of the chairmen. All meetings of the Commission and all agenda must have prior approval of the chairmen.

e) In carrying out its responsibilities, the Commission is authorized to:

1) Conduct hearings, interviews, and reviews at field sites, or wherever deemed necessary to fulfill its duties.
2) Confer with Indian tribal government officials and members, private sector business officials and managers, and other parties dealing with matters pertaining to the Commission's mission.

In order to carry out the responsibilities contained in its Executive Order, the Presidential Commission on Indian Reservation Economies settled upon a Management Plan which contained various methodological approaches to fulfilling its charges.

METHODOLOGY

Background:

From the beginning of the Commission, it was apparent that a large number of constituencies, within and outside of government, claimed to know what the obstacles were to Indian economic development, as well as knowing what the solutions should be. The Commission's tendency was to accept identifications made by individuals, but not to accept individual identifications as being all inclusive, nor to accept individual solutions as being dispositive. A problem which surfaced in the early days of the Commission, was the plethora of obstacle identifications being thrust upon the Commission, along with solutions which were being advanced with great emotional conviction. Complicating matters was the fact that points of view, and particularly the solutions advanced, were not always in agreement.

In order to carry out the responsibilities set forth in the Executive Order to insure that anyone who had a problem to identify could present it to the Commission; and to expand the range of viewpoints on problems, the Commission proceeded to develop a study approach which would accomodate these needs. In thinking about a methodology to capture all of the problems, it became important to avoid a number of pitfalls. One potential pitfall was seen as bland and uncritical acceptance of the conventional wisdom about Indian economic development problems. Another pitfall to be avoided were ad hominem pressures which would reflect the personal interests of the Commissioners themselves. Rejecting such pressures and a priori solutions, the Commission developed a methodology which contained the following elements:

a) Scope of Study
b) Obstacle Definition
c) Economic Content Analysis
d) Attribution Analysis
e) Frequency Analysis
f) Functional Analysis
g) Synthesis/Rank Ordering
h) Characterization
i) Indian Expert Panel review
j) Commission Review

How these elements were applied to studying identifications of obstacles to Indian economic development, is discussed in more detail below.

a) Scope of Study:

Within the limited resources and time available to the Commission to complete its work, it was decided that a number of specific perspectives on problems confronting Indian economic development would contribute to a better understanding of obstacles impeding that development. The following perspectives were incorporated into the overall study effort:

Perspective	Study Effort
- Indian people	- Nationwide Field Hearings
- Academia	- Indian Economic Development Literature Review
- Business	- Private Sector Study on Opportunities and Constraints
- Federal Government	- Critical Path to Failure Study of Federal Programs and Administrative Systems
- State & Local Government	- Local Government Conflict Analysis

While each of the study efforts noted above employed different methodological approaches to identifying obstacles to Indian economic development, what they had in common was that they were all geared to obstacle identification. As such, the outputs from these study efforts were identifications of obstacles to Indian economic development, from different perspectives.

b) Obstacle Definition

An "obstacle" to Indian economic development was defined as anything which adversely affected competitive returns to land, labor, and capital (factors of production) as they were factored into the economic development process. For example, "zoning" as an identified problem could be considered an obstacle in the sense that it adversely affects competitive returns to land. Since it is obvious that an obstacle can have more than one effect, obstacle analysis included primary, secondary, and tertiary effects. In all cases, the determination would be made from an analysis of the specific situation or other information presented to the Commission.

c) Economic Content Analysis

Information developed through the analytical study efforts above, was subjected to an economic content analysis. A problem cited by a witness, for example, would be analyzed to determine whether or not that problem, in the particular situation presented, adversely affected competitive returns to land, labor, or capital. If there were adverse affects on competitive returns to a given factor of production, then the problem cited was noted as an obstacle.

As a result, grouping obstacles according to land, labor, and capital, was made possible.

d) Attribution Analysis

Once an obstacle was categorized according to its primary factor of production, land, labor, or capital, an attribution analysis was undertaken. The purpose of an attribution analysis was to determine whether or not the obstacle was primarily attributable to the federal government, state and local government, tribal government, or other source. As a result of this analysis, a matrix could be constructed within which data cells containing specific identifications of obstacles could be noted. A simplified matrix is shown below as an example:

(EXAMPLE)

FACTORS OF PRODUCTION	AREAS OF ATTRIBUTION			
	FEDERAL	STATE & LOCAL	TRIBAL	OTHER
LAND	leasing BLM surveys	fishing dispute	zoning	rural-isolat.
LABOR	training		Indian pref.	
CAPITAL	Ind. Fin. Act trust funds	banking law	sovereign im.	

Obstacles which were identified from the different analytical tracks were placed in expanded data cells which contained great numbers of individual obstacle identifications. There were 2,320 individual identifications of obstacles to Indian economic development.

e) Frequency Analysis

As data on obstacles to Indian economic development was identified by the study approaches chosen by the Commission, those obstacles were loaded into data cells. Many of the obstacles identified to the Commission as problems were the same; that is, the same obstacle came to be identified more than once and from more than one source. A frequency for each obstacle was logged each time it was identified and a running total was kept and data was added to each cell. For each obstacle included within a particular cell, a superscript number was added to indicate the number of times that obstacle was identified.

f) Functional Analysis

Over a period of time, a great number of obstacles began to populate each cell. Many of the obstacles, while individually separate, were functionally related. For example, leasing procedures, leasing regulations, leasing approvals, and leasing delays, all have "leasing" in common. For purposes of grouping obstacles functional analysis of obstacles within a cell was conducted to determine functional relatedness, As a result, obstacles could be grouped and their frequencies added.

g) Synthesis/Rank Ordering

Each study produced obstacles which were analyzed for their economic content, area of attribution, frequency, and functional relatedness. Obstacles groups were then arrayed according to their frequencies. Frequency did not denote importance, only persistence.

h) Characterization

Each obstacle grouping was then characterized. The characterization was largely based upon situational information provided along with the obstacle's identification. Narrative characterizations were written. Characterizations of obstacles were developed from information provided to the Commission and as such do not represent the views of the Commissioners, but the views of those providing that information through the study approaches.

i) Indian Expert Review Panel

A panel of Indians was selected to review the completed findings on obstacles to Indian economic development. The panel was composed of Indians who either represented regional or national Indian organizations or who represented regional Indian tribal interests. The purpose of the panel review was to share what the Commission had found in the way of obstacles to Indian economic development, and to obtain comments, suggestions, and additional points of view on each obstacle. The results of the panel review were presented to the Commissioners.

j) Commissioner Review

The Commissioners met and deliberated on the findings and comments submitted by the Indian expert panel. The findings were the basis for recommendations made by the Commissioners.

The methodology employed by the Commission was not designed for scientific accuracy. It was designed to accomodate different points of view, to view problems in an economic context, to group similar problems, and to record their persistence. No where was there an attempt to make a statement of importance. Moreover, there was no explicit attempt to scientifically explain causation. Attribution, for example, related more to location of a problem or its nature than it did to causation per se. The methodology provided an organized way of looking at problems. Other ways could have been developed as well, time and resources permitting.

II SPECIAL INITIATIVES TO PRIVATE ECONOMIC DEVELOPMENT

SPECIAL INITIATIVES UNDERTAKEN BY THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

INTRODUCTION

The Commission determined initially that it would not be just another study group, preparing a report which would gather dust on a library bookshelf. From the outset the Commission has been action oriented.

Five analytical tracks were developed, each representing a different perspective on Indian economic development. A Special Initiatives track was developed to provide information on a case specific basis. The Commission identified and promoted Indian positions on matters of current importance in a number of areas, in advance of compilation of the Final Report to the President.

The Commission's assertive position on Indian Tribal Governmental Tax Status Act regulations was accepted in full by the Internal Revenue Service. The Commission took a strong position favoring tax-exempt status for tribal industrial development bonds which unfortunately was not approved by the 98th Congress.

The Commission requested that the Department of Health and Human Services upgrade the organizational position of the Indian Health Services, and asked Congress to include tribal membership on the Advisory Commission on Intergovernmental Relations.

Some of the special initiatives pursued during the past year which yielded valuable information on obstacles, causes and some possible solutions to Indian reservation economic development included the following areas:

THE INDIAN TRIBAL GOVERNMENTAL TAX STATUS ACT

The Commission worked actively with the Department of the Treasury and the Congress to secure reauthorization of the Indian Tribal Governmental Tax Status Act of 1982. Early action by the Commission was essential in assuring permanence for the Indian Tax Status Act. The Act enables Indian tribal governments to be treated in the same manner that states or political subdivisions of states are with respect to certain sections of the Internal Revenue Code.

The Commission was not successful in getting language adopted by the Congress which would have included tax exemptions on tribal industrial development bonds. However, the Commission is recommending that the Administration continue to seek acceptance for the industrial development bond language in new legislation to be submitted to the 99th Congress in 1985.

Approval by the Internal Revenue Service of the Commission's recommendations to give tribal governments the same privileges as states or political subdivisions of states for tax exemption purposes has the following effects:

1) Those paying taxes imposed by tribes would be entitled to deduct the tribal taxes in computing their federal tax liability;

2) Gifts of cash and other property to tribal governments will be deductible for federal income, estate and gift tax purposes;

3) Tribal governments will be exempt from a number of excise taxes, including those on manufactures, special fuels, highway use, and telephone service;

4) Tribal governments will be able to offer tax-deferred annuities and public retirement benefits to certain employees;

5) Tribal governments will be able to issue certain tax-exempt revenue bonds, although the exemption does not extend to private activity bonds, including certain industrial, scholarship, and mortgage subsidy bonds.

The new regulations adopted by the IRS define "essential governmental functions" in a broad sense, which allows tribes a maximum amount of flexibility in exercising their tax status. For example, funds necessary to support health, education or welfare facilities under contract to tribes from federal agencies would be in the nature of governmental functions contemplated by the regulations. Basic infrastructure and community development which serve a public purpose would also be eligible functions.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS ACT

The Commission recommended to the Congress that it amend the Advisory Commission on Intergovernmental Relations Act by adding an Indian representative for tribal governments.

The Advisory Commission on Intergovernmental Relations was established by statute and includes 26 members from the executive and legislative branches representing all three levels of government. Its members include three members from both the Senate and the House of Repesentatives, three executive branch officials, four governors, four mayors, three state legislators, three county officials and three private citizens. Its fundamental purpose is to strengthen the ability of the federal system to meet the problems of an increasingly complex society by promoting greater cooperation, understanding and coordination of activities between separate levels of government.

The Commission feels that the addition of an Indian representative of tribal governments is consistent with President Reagan's stated government-to-government policy for Indian tribes.

POTENTIAL TIMBER PROJECT IN ASIA TO UTILIZE LOGS AND WOOD PRODUCTS FROM TIMBER OWNING TRIBES IN THE PACIFIC NORTHWEST AND ALASKA

The Commission identified and has been tracking a potential timber and wood products project in the Federated States of Micronesia in the South Pacific which appears to have considerable potential for expanding the export of logs and wood products from timber owning tribes close to water based transportation facilities in the Pacific Northwest and Alaska.

This project is of interest in its own right. It may be a model for other projects by demonstrating how Indian and non-Indian entrepreneurs can work together to the mutual interest of all parties to open up new markets for Indian products; to mobilize capital investments; and to access specialized expertise needed for establishing and operating processing plants as well as for entering the export market directly rather than through brokers and third parties. One of the options that the involved tribes may explore would be the creation of an export trading company.

The base concept of the project is to ship cut timber, and possibly processed and semi-processed products such as wood chips as well as lumber, to Micronesia for further processing. This could include cutting to a particular market's specifications and producing items such as particleboard made from wood chips. The market for such products would primarily be China, but would also include Japan and newly industrializing areas such as South Korea, Singapore and Hong Kong. Products could also be shipped directly to these countries from the Pacific coast of the United States and Alaska.

In addition to lumber mill and wood processing facilities in Micronesia, the project may generate possibilities for other wood processing facilities on Indian reservations for wood chips and for rough or final processing of logs and lumber. At a later stage in the project there may be the need for such additional facilities in China to handle larger volumes of log purchases by the Chinese.

At one end of the scale, this potential project represents an opportunity for increased timber sales by Indian enterprises in the Northwest and Alaska. At the other end of the scale, the project could be organized as a joint venture involving American Indian participants, private Micronesian and American investors, and a Micronesian state government. There may also be possibilities for participation by Chinese government corporations in the joint ventures.

Indian participation as partners in the venture, including participation in downstream economic benefits from the higher value added processing and sales of the wood products, could come about through providing the timber in long-term supply contracts.

The value to the project of American Indian involvement is that logs from Indian owned lands are not under the same export restrictions as logs from U.S. Forestry Service and Bureau of Land Management lands, and the major timber owning tribes could provide guaranteed long term supplies of logs and wood products.

The value to the project of the Micronesian government's involvement is its ability to guarantee financing or to participate directly in financing the project. This could be done by utilizing the substantial funding to be available to the Micronesians over the next fifteen years as these countries move into free association with the United States after four decades of trusteeship. The Micronesian government involvement would also help in developing a market for the wood products in Pacific Rim countries such as China, Japan, South Korea, Singapore and Hong Kong.

The value to the project of the possible involvement of Chinese government corporations would be to provide guaranteed long term markets for logs and wood products. Other possibilities to explore, depending on th degree of interest by Chinese authorities, would be to join the project as investors and joint venture partners for the lumber mills and wood processing facilities in Micronesia as well as on Indian reservations in the United States.

The benefits which could accrue to timber owning Indian reservations include increased income to Indian enterprises through larger timber sales, creation of more jobs on the reservations for the cutting and the processing of logs and wood products, and participation in the higher value added downstream benefits through processing and export sales of finished wood products beyond those which would occur from the sale of logs to middlemen of third parties for domestic consumption or for export to China and elsewhere in Asia.

The Commission has participated in a series of meetings with the project organizers, representatives of timber owning tribes in the Pacific Northwest and Alaska, and the Intertribal Timber Council in Portland, Spokane and Seattle.

The Commission plans to participate in an upcoming exploratory trade mission to Micronesia and China, accompanied by representatives of interested tribes, potential United States investors and representatives of the Government of the Federated States of Micronesia.

FEDERAL PROCUREMENT AND CONTRACTING INITIATIVE

Another action which the Commission has utilized as a special initiative case study involves federal procurement and contracting with Indian enterprises.

There are a variety of preferential procurement authorities and programs by the federal government designed to stimulate business with certain groups of firms. These include small business set-asides and labor surplus area set-asides for purchasing actions by all federal agencies, small and disadvantaged business contracting by the Small Business Administration under their 8(a) program, and "Buy Indian" authorities of the Department of Defense.

However, testimony before the Commission's hearings and results of analyses and discussions with a wide variety of government agencies shows that Indian firms are having difficulty in achieving equal access to the government's preferential procurement programs and making the federal procurement system work for them in the same way that it does for other and larger minority and disadvantaged groups.

The Commission is recommending a concerted effort by the federal government to provide equal access by Indian enterprises to the purchasing power of the federal marketplace. Such an effort could give a market led stimulus to capital growth, job creation, and business and management expertise on the reservations.

It is estimated at the present time that current federal procurement and contracting with Indian tribes and Indan firms comes to some $450 million per year, or roughly two-tenths of one percent of total federal procurement. This includes "638" and "Buy-Indian" procurement by the BIA and the IHS, and 8(a) contracts to Indian firms.

If contracts with Indian firms could be increased each year by one-tenth of one percent of government purchasing, this would add some $200 million in new contracts for Indian enterprises. Such an increment each year would likley add some 9,000 new jobs in Indian firms, and some 3,000 new jobs in businesses supplying parts, materials and services to these Indian firms. This would have a positive impact not only on Indian reservations, but in the surrounding local communities and rural economies as well.

It is estimated that this direct and indirect employment impact would add some $171 million per year in wage income to the economies of the Indian reservations and the the local rural economies. It is estimated that this would, in turn, generate some $19 million in federal income taxes. If these yearly increases could be maintained over a ten year period, this would mean that government contracts to Indian firms in the year 1994 could create jobs for 88,000 people in Indian enterprises and 30,000 indirect jobs in service and supply firms. This could lead to $1.7 billion in wage income and to some $188 million in federal income taxes.

This contracting and procurement initiative would not require new federal funds. It would draw upon existing and planned budgets of government agencies who buy goods and services from the private sector to carry out their government missions. It would not give money to Indian firms. It would seek to improve the access by Indian firms to the federal marketplace, and allow them to earn money from these procurement contracts.

Individual Indian owners of firms would benefit from capital formation and improvement of business skills. Indian workers would benefit from wage earnings and from being participants in a producing system rather than recipients in a welfare system. Tribes would benefit from a strengthened economic base.

The federal agencies would not be disadvantaged because the Indian suppliers would have to meet the quality, delivery, and cost requirements dictated by the missions of the agencies.

The federal government would benefit from a broadened tax base, and the shared benefits of local development.

III FINDINGS OF THE COMMISSION

COMPOSITION OF OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT

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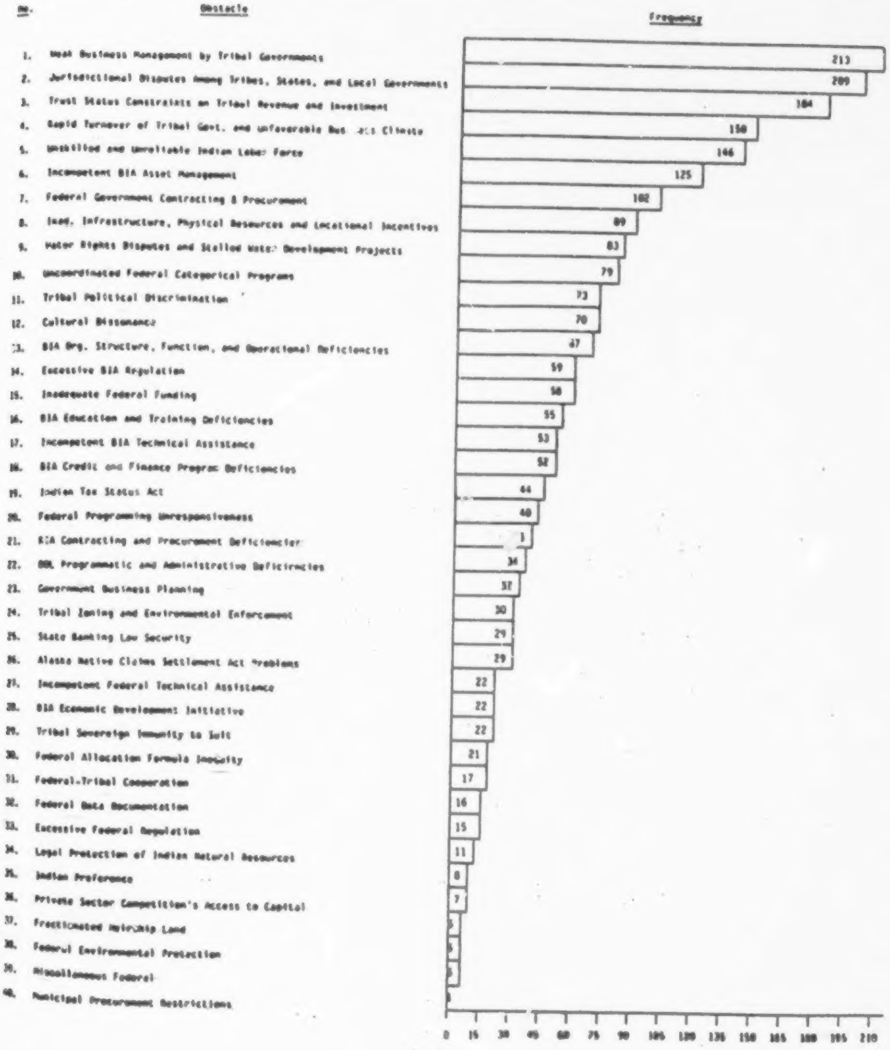
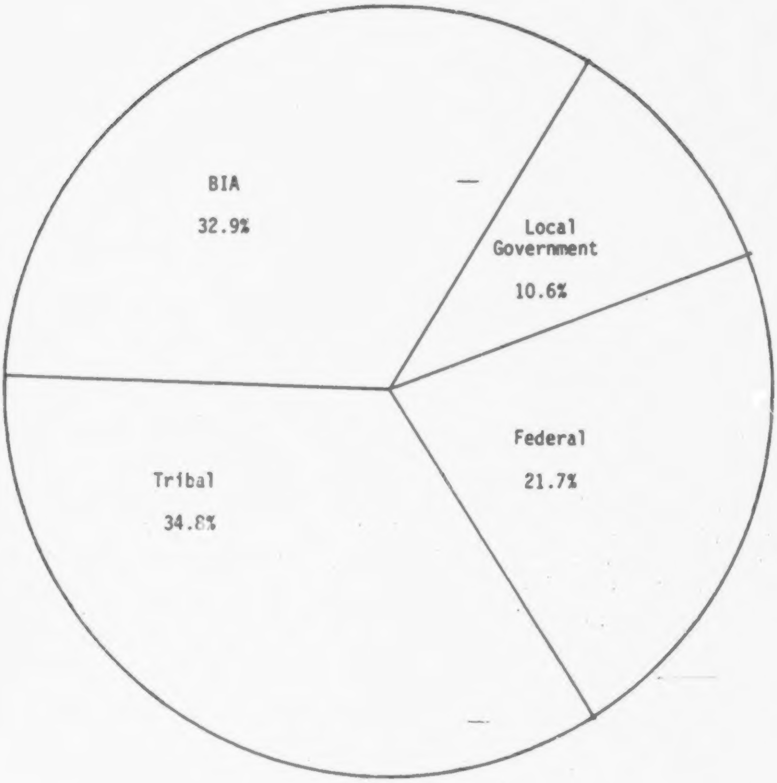
OBSTACLES TO INDIAN RESERVATION ECONOMIC DEVELOPMENT



COMPOSITION OF OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT



TRIBAL GOVERNMENT OBSTACLES
TO
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COMPOSITION OF TRIBAL OBSTACLES
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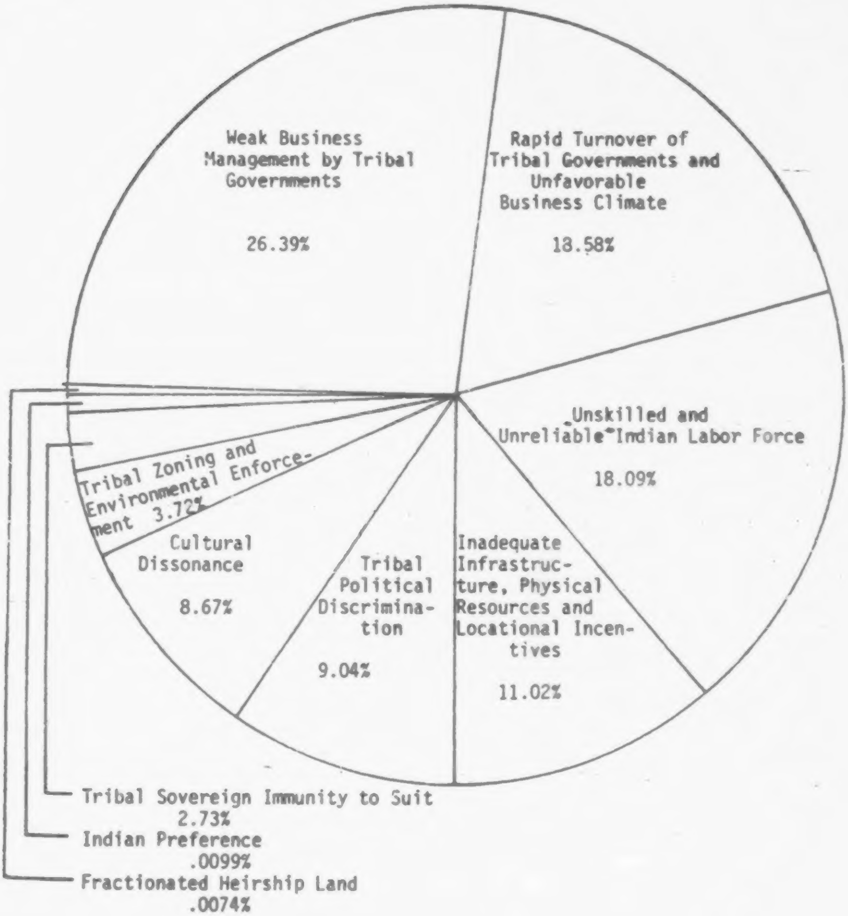

TRIBAL GOVERNMENT OBSTACLES TO INDIAN RESERVATION ECONOMIC DEVELOPMENT

1. Weak Business Management by Tribal Governments Freq. 213

The Commission finds that weak business management by tribal governments contributes to the failure of those businesses. There are a number of key differences between businesses and tribal governments. The table below identifies some of the critical distinctions:

TABLE 1.
KEY DIFFERENCES

Private Sector	Tribal Government
Profit Driven	Social Welfare Driven
Business Planning	Big Picture Planning
Cost Control	Budget Based Proposals
Entrepreneur, CEO	Tribal Bureaucracy
Reward System	Patronage System
Product Competition	Organization Competition
Focus on Needs	Focus on Rights
Independent	Dependent

Tribal governments have different goals from businesses. Tribally run businesses tend to focus on employment rather than profits as a goal. Instead of concentrating narrowly on the needs of a business, they tend to focus on economic development planning. As a consequence, businesses tend to be overbuilt and then sold to the federal bureaucracy in the form of budget based proposals. Proposals, rather than business plans, are generated to justify subsidies and grants for projects which would not be able to pay for themselves out of projected sales revenues. Tribal business bureaucracies do not identify managerial talent. They compete with individual entrepreneurs or fail to secure expert assistance before they build a budget based project on paper. Many tribal staff are woefully inexperienced in business and are ill-equipped to manage, evaluate, or counsel tribes in business planning. Their inability to develop proper business plans which show projected sales and rates of return is a major barrier to securing private investment. Financial institutions are more concerned with repayment plans as a basis for making a loan than they are with foreclosing on collateral. The "mind set" of budget-based organizations runs deep. Tribal bureaucracies market overbuilt proposals which embody political agendas for employing large numbers of Indians rather than focusing on the needs of individual Indian businessmen.

Businesses employ reward systems which pay for performance. Tribal government businesses utilize a patronage system where there is an indirect relationship between pay and funding since employment is frequently subsidized by tribal income or federal subsidy. In business, products compete in terms of quality and price. In tribal governments, bureaucratic organizations compete for funding and influence.

While businesses focus on the specific needs of businesses, tribal governments' focus is diffused. While businesses seek to build an asset base and a cash flow, tribal governments seek "instant" large scale employment projects and "Marshall Planning."

Businesses run by individual Indians are generally smaller but more successful than tribally run businesses. They are managed by Indians who know and are devoted to their businesses. There is not a lack of talent or potential for entrepreneurs on Indian reservations. There is however an active undervaluing of this talent.

In part the failures of tribal government businesses can be ascribed to an overdependence on federal programming which focuses on government scaled planning. Tribes merely mirror the needs of the federal bureaucracy. In part, failures can be ascribed to an undervaluing of Indian entrepreneurs who may be viewed, in cultural terms, as having a narrow-minded preoccupation with making money. Tribal ownership of most property on Indian reservations enables tribes to fall into the trap of big picture development, and high unemployment rates mitigate against permitting tribal assets to be used more profitably by individual Indian entrepreneurs who may be seen as profiting at the expense of others.

2. Rapid Turnover of Tribal Governments and Unfavorable Business Climate Freq. 150

The instability of tribal governments is an obstacle to Indian reservation economic development. Tribal governments are characterized by high turnover of politically elected council officials, factionalism among constituencies, infighting, and distrust. Political instability has a number of adverse effects upon the business environment. Tribal governments have frequent changes in policy, direction, investment, and commitment. Business agreements negotiated by previous tribal councils are changed or abrogated. The fact that many tribal office holders lack business experience adds another dimension to the problem of high turnover. Management of tribal businesses suffers from abandoned commitments. No tribal commericial, corporate, revenue, or property laws are in place to fill the vacuum of uncertainty which political instability creates. Political instability undermines business planning and undercuts development of a healthy reservation private sector. These factors contribute to the development of an unfavorable business climate for private sector investment.

When subsidy-based business projects fail to generate the revenues predicted by tribal proposals and when maintaining employment levels in unprofitable, tribal businesses create a drain on tribal revenues. Tribal councils are then unable to distribute employment rewards to their supporters.

Tribal governments are destabilized by the failure of government run business. When tribal government businesses cannot produce political rewards for patronage and constitutency agendas, the office holders who built the budget based white elephants are voted out of office. Instead of patiently supporting individual Indian entrepreneurs to build from the ground up, tribal governments focus on a quick fix by intensifying their dependency on the federal government. Implicit to the destabilization process is a confusion over roles. Tribal governments mistakenly see themselves, rather than individual Indian entrepreneurs, as developers and managers of business.

3. Unskilled and Unreliable Indian Labor Force Freq. 146

Inferior education, high drop-out rates, and lack of labor markets are factors which contribute to the pool of unskilled Indian labor. Past federal training efforts, such as CETA, focused on training individuals through employment in tribal government. Since tribal government labor markets are dependent upon outside grants-in-aid, CETA training for public sector employment had generated nearly 25% of Indian reservation employment in non-business activity. Labor was also trained for employment in tribal government run businesses which were not capable of maintaining that employment without further subsidy.

Recognizing the weaknesses of demand in private sector labor markets, the federal response was to create programmatically an artificial demand for labor in the tribal public sector by focusing on tribal "government" employment and training.

Lack of skills, chronic unemployment, absence of individual opportunity, and federally supported systems of tribal patronage contribute to an environment characterized by social welfare dependency, broken families, low self-esteem, alcohol and drug dependency, high delinquency and crime rates, ill health, suicide, and despair. The reliability of Indian labor is adversely affected by the negative environment which subsidized dependency has created. Reliability is further exacerbated by inadequate roads and systems of reliable transportation on Indian reservations.

4. Inadequate Infrastructure, Physical Resources, and Locational Incentives Freq. 89

There is a perception that inadequate infrastructure, inadequate natural resources, and geographic isolation are obstacles to Indian reservation economic development. Past federal economic development efforts concentrated on public facility grants and loan based construction of infrastructure such as industrial parks, tourism complexes, tribal administration buildings, water and sewer systems, access roads, and school, housing, and medical facility construction. Since most public works construction was 80-100% grant, public works was a popular program. Of the approximately 40 industrial parks built on Indian reservations, few have significant utilization levels. The presence of empty industrial parks, overbuilt tourism complexes, tribal administration buildings, improved roads, subsidized housing, and enhanced utilities did not succeed in attracting industry. In fact depreciation, maintenance, and payment default costs require more grant support. Moreover, the presence of abundant natural resources is no guarantee of economic success. The Council of Energy Resource Tribes experiences high unemployment as well.

While inadequate infrastructure and scarce natural resources are not beneficial factors influencing economic development, they are not insurmountable obstacles. Infrastructure and natural resources are seen as incentives that attract business. Businesses, however, are attracted by profitability. Most businesses in the United States are not natural resource dependent and most would not require any more infrastructure than presently exists on most Indian reservations.

Isolation and distance to markets are more serious obstacles, but only for transportation sensitive goods and services. There are many Standard Industrial Classification system industries which, at appropriate scales of production, could operate profitably on Indian reservations. Other factors, such as labor resources, competitive wage rates, and attractive financing are more influential site location factors.

5. Tribal Political Discrimination Freq. 73

Both Indians and non-Indians complain of political discrimination against them by tribal governments and by tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Businesses see uncertainty in situations where law is subordinate to the whims of tribal councils, especially where tribal governments are destabilized by frequent political turnover of elected office holders. There is a fear that tribal courts will not protect the property rights of non-Indians by according them due process of law or protecting individual non-Indian civil rights. Uncertainty increases risk and risk increases the cost of doing business on Indian reservations.

Tribal government patronage systems and the politicization of tribal courts are significant obstacles to Indian reservation economic development since they discriminate unfairly against individuals and businesses. A lack of sovereign responsibility deters investment.

6. Cultural Dissonance Freq. 70

Intercultural complications affecting economic development on Indian reservations exist for Indians and non-Indians alike. There are problems in mutual understanding between the dominant culture and Indian culture. There are also cross-cultural issues among Indian people since there are almost as many Indian cultures as there are tribes. This cultural diversity makes it difficult to generalize among tribes in their approach to economic development. Values favoring the conservation of resources and equality in the distribution of tribal income are noteworthy in the Indian economic development literature. Consensus on resource use and distribution of income become important local issues since each tribal member has a distributive interest in tribal wealth.

The World Bank has encountered tribal issues in its devlopment work overseas. The Bank's consideration of the needs of tribal people may have some applicability to the situation on American Indian reservations. In "Tribal Peoples and Economic Development", the Bank points out that historically tribal minorities in all parts of the world have suffered for centuries from the adverse effects of expansion from outside into territories that were formerly entirely tribal and once supported large tribal populations. Despoliation of their renewable resources often severed such people from their economic and social bases and relegated formerly self-sufficient societies to the lowest economic level of the national society. Dominant societies usually sought to impose their value systems, socioeconomic and cultural patterns and organizations, and language on tribal groups.

Formerly, this was generally accepted as an inevitable by-product of development. Tribal people were expected to drop their own culture and adopt that of the dominant society as the cost of modernization. Negative consequences of inadequately designed and implemented development efforts were justified as being painful, but necessary, side effects of a process that was for the greatest good of the greatest number. However, the destruction of weaker societies by stronger ones corresponds to a view of social evolution that is impossible to justify both legally and ethically.

Experiences from American Indians and from traditional cultures around the world show that self-determination regarding cultural values and change can be combined, albeit slowly and with difficulty, with self-determination regarding economic development to the benefit of all concerned. Tribal groups can make valuable contributions to the wider society as well as strengthening their own societies. Also, tribal populations cannot continue to be left out of the mainstream of development. However, as in other areas of self-determination, tribal people should set their own pace to become as fully participatory in economic development as other parts of society.

Decision making by Indians and non-Indians needs to take into account that the absorptive capacity of tribal populations for development and change may be lower and take longer than that of other populations in the society. The very concept of time itself may be different for different groups at different periods. To business, time is money. To tribes, time may be consensus. The cumbersome process of arriving at a consensus which is subject to change is not well understood by a dominant culture. Failing to recognize that it takes time to reach a consensus is a failure to understand tribal political culture. Without consensus, actions by tribal councils are frequently overturned by new tribal councils because a true consensus was never reached.

Business planners, economic developers and government officials, in order to deal effectively with cultural pluralism and cross-cultural communications, need to recognize that solutions need to be tailored to the specific circumstances of each tribe and that people be given the opportunity to participate. Freedom of choice is worthless without understanding the implications of the given alternatives and the ability to choose between them.

7. Tribal Zoning and Environmental Enforcement — Freq. 30

The authority of a tribal government to enact comprehensive or partial zoning ordinances restricting different types of reservation based economic activity is an obstacle when that authority is abused. When an area is rezoned and businesses are adversely affected, it is a problem. When areas are zoned without regard to economic considerations, business is deterred. When reservations have large concentrations of non-Indian population and significant non-Indian land ownership, there is fear that tribal zoning will be unpredictable. Tribal zoning which is at variance with surrounding county zoning creates problems with waste disposal, law enforcement, fire protection, highway maintenance, etc.

Application of standards which are more stringent than National Environmental Protection Act standards are standards which impose greater costs on business. At the same time, the failure to exercise proper standards can result in damage to the environment which is harmful to competing resource users who must work with lands whose productivity has been lowered.

8. Tribal Sovereign Immunity to Suit — Freq. 22

Indian tribes are held to possess attributes of sovereignty. One of these attributes is sovereign immunity to suit. Of the 487 federally recognized Indian tribes and Alaskan Native groups, 134 (27%) have Indian Reorganization Act corporate charters which permit them to sue and be sued. Generally speaking, suits against a tribal sovereign have only been permitted where there were tribal or Congressional waivers of sovereign immunity and the remedy did not involve tribal property held in trust.

Sovereign immunity may be raised by tribes as a bar to suits brought against them by their own members or by non-members in cases involving civil rights, property, contracts, or a dispute of any kind.

Sovereign immunity to suit creates risks for businesses who engage in economic activity on Indian reservations since it makes actions by tribal governments immune from challenge and exposes investment to loss where a tribe decides to deny a claim by raising the bar.

9. Indian Preference in Employment Freq. 8

Section 12 of the Indian Reorganization Act, 25 U.S.C.A. sec. 472, provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

A consent decree in Tyndall v. United States, No. 77-0004 (D.D.C. Apr. 22, 1977), extended these hiring preference requirements to the Indian Health Service. Moreover, the Buy-Indian Act and Indian Self-Determination and Education Assistance Act create Indian preferences in contracting. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court held that Indian preference was based on the unique legal status of Indian tribes as politically recognized entities. It held that Indian preference did not constitute "racial discrimination" since it was not a "racial preference," but rather a political preference.

When tribal governments impose their own Indian preference laws on businesses located within reservation boundaries, they impose higher labor costs. This is particulary true when there is an absence of trained individuals for specific occupations. Indian preference as a legal requirement is viewed as a disincentive to private investors.

Indian preference however, does not extend to business activities which are unionized and covered by the National Labor Relations Act. Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir. 1961), held that a tribal government ordinance violated the NLRA where governmental action interfered with collective bargaining activity.

10. Fractionated Heirship Land Freq. 6

Fractionated heirship land is land which has two or more undivided interest owners. The allotment acts set aside tribal lands for allotment to individual Indians for farming and ranching. The size of the allotments varied according to their intended uses. Allotment size contemplated subsistence at nineteenth and early twentieth century levels of technology. Fractionated heirship land is a problem which generates many complaints about financing and leasing.

Approximately 90% of all Indian trust land in the lower 48 states is farming or ranch land. The Bureau of Indian Affairs estimates that of the 9,989,041 allotted acres of land, 75% of it is in an undivided, fractionated state. Since real property averages about 73% of average total farm investment, it is clear that the average Indian farmer or rancher has less land to work with today, at present levels of technology, than did his ancestors whose lands were not fractionated.

Having less real property with which to work, farmers and ranchers turn to federal programs for favorable financing to pay for leases of additional land and the machinery, equipment, fertilizer, etc., which more capital intensive farming or ranching require. Much attention is focused on the Farmers Home Administration, its Indian Land Acquisition Program, BIA Revolving Credit and other sources of federal support.

The root cause of many Indian farmer and rancher problems, however, lies in the inequitable distribution of Indian lands and in the synergic system of tribal and BIA leasing which work to the disadvantage of farmers and ranchers. Many Indian farmers and ranchers could be "saved" if Indian tribes studied serious land reform. Individual farmers and ranchers are undercapitalized from the start, yet their tribes hold nearly 90% of the farming and ranch lands which they lease to Indians and non-Indians at rates which are designed to support the tribe, not the individual.

BUREAU OF INDIAN AFFAIRS OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT

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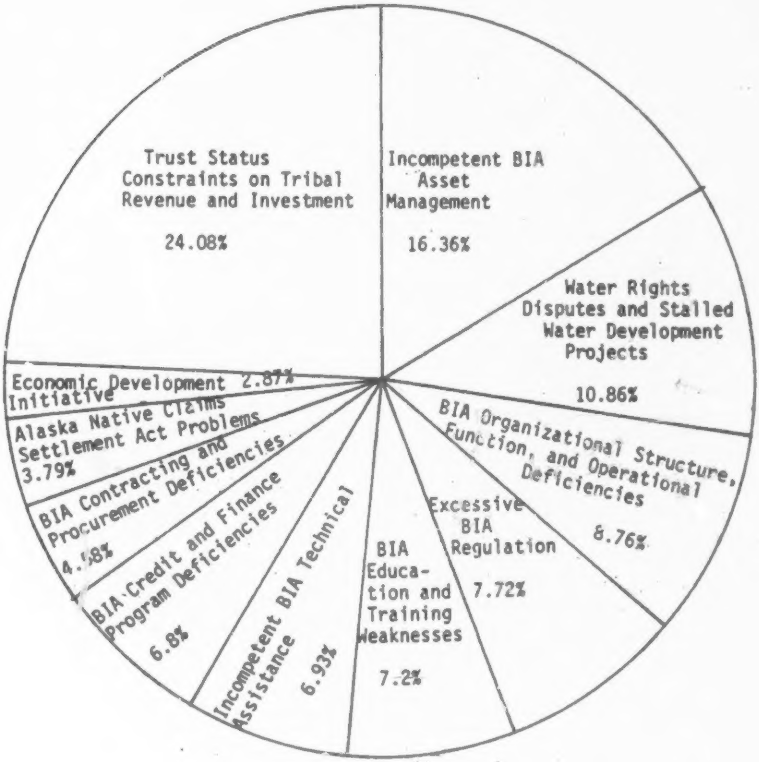
COMPOSITION OF BIA OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT



1. Trust Status Constraints on Tribal Revenue and Investment Freq. 184

Trust status constraints operate as an obstacle to Indian reservation economic development in a number of ways since these constraints constitute a complex framework of regulatory control over Indian assets. The constraints are authorized in treaties, statutes, regulations, procedures, and manuals governing specific resources such as land, minerals, timber, water, hunting and fishing, and trust funds. The trust status of Indian resources is not just an obstacle to economic development from the perspective of collateral for financing. Bureaucratic regulation and control of Indian asset management is also a problem.

Trust status means that Indian tribes lack the same property revenue base that local governments have. It also means that capital which they already have cannot be flexibly used for tribal investment. Trust status freezes tribal assets in a pre-capitalist state.

2. Incompetent BIA Asset Management Freq. 125

Since the Bureau of Indian Affairs has not completed soil classification, timber, mineral, or water inventories, it cannot possibly know what resources it is managing. Without soil classification, it is not possible to know what is the proper or best use of land. To lease lands and to provide for so many animal unit months (AUMS) per acre, when the capacity of that land is not known, is to place the asset in risk of waste. Without completed timber management plans which include comprehensive forest inventories, it is impossible to know what the productivity is of a forest. Sustained-yield management cannot exist without a knowledge of the basic resource. Annual allowable cuts are based more on past experience with mismanaging forests than they are on a knowledge of the resource. In 1984, the 6 million acres of Indian commercial forest lands were managed with a budget of $27 million and 786 full-time-equivalent (FTE) employees. In comparison, Weyerhaeuser manages about the same number of commercial forest acres, but with significantly more resources committed to the task. Similarly, mineral inventories have not been completed for all Indian reservations, nor does the Bureau of Indian Affairs know how many acre feet of Indian water it is supposed to be protecting. Without a knowledge of basic natural resources, the BIA cannot succeed at resource management nor resource protection.

An inadequate resource data base makes it difficult to develop management plans and to budget properly. Instead of managing, the Bureau regulates. It exercises a monopoly power over leasing which either interferes with tribal decision making, or imposes intolerable costs on businesses which experience long delays in bureaucratic approval. Many personnel are not competent in their jobs and there is a dearth of qualified specialists in natural resource areas.

Tribes experience difficulty with BIA leasing policies and procedures, land servicing, appraisals and surveying, bureaucratic interference, bureaucratic layering, and delays with required approvals, all of which increases the costs of doing business. Tribal resources are not being managed, they are being overregulated, and the overregulation does not work to the benefit of tribes or Indian individuals. Estimates are that nearly one-half of all leases approved by the Bureau are out of compliance.

Incompetent management is not limited to natural resources, it extends to tribal trust funds. While BIA investment activity receives high marks, the accounts reconciliation side for returns to investment approaches trust irresponsibility. For at least the last six years, the BIA has refused to follow through on General Accounting Office findings and recommendations. The GAO seriously doubted that trust fund management could be improved by the BIA's choice in the purchase of a $15 million computer. Without the proper accounting software to reconcile returns to individual Indian money accounts, the BIA cannot expect to produce balanced accounts. Moreover, pilot projects which experiment rather than rectify accounting system problems, cannot overcome the systems deficiencies, particularly when there has been no financial audit of each account that is out of balance.

Furthermore, trust funds management is not organized to be responsive to tribal investment goals. Testimony indicated that it takes from 30-45 days to effect an investment transaction. Tribes are unable to utilize their trust funds by depositing them locally, using them for leverage or even as equity.

3. Water Rights Disputes and Stalled Development Projects Freq. 83

Rights to the use of water have been reserved by Indian tribes through treaties with the United States, and reserved by the United States for Indians through executive orders and congressional acts. Water rights thus reserved were never comprehensively quantified by the trustee Bureau of Indian Affairs. As a consequence, the Bureau of Indian Affairs historically has been ignorant of the quantities of water it was to protect and manage.

As a result of its failure as trustee, the Bureau of Indian Affairs is the cause of most water litigation and water development problems; this is a disadvantage to Indian reservation economic development. The failure to properly document Indian water resources has meant that water projects were not built when and where they could have been. Moreover, non-Indians suffer the injustice of first having been permitted to use Indian water and then, after having invested in its use, being deprived of that use and consequently their investment.

Nearly 54 water rights disputes are in litigation, and nearly 100 Indian water projects are either uncompleted, pendente lite, or otherwise in a state of disrepair. The trustee has therefore settled upon costly litigation as the method for water resource allocation instead of quantifying Indian water rights and then protecting those rights through water development, or through marketing of water, with payments going to tribes. (For further discussion, see Appendix: "Tribal Water Rights Issues: Prospect for Economic Development.")

The present process of negotiated water rights agreements is an important step toward identifying Indian water rights. Without water rights agreements, excessive litigation will continue to impose high costs on tribes, individual Indians, non-Indians and businesses. Water development projects which are already deteriorating will become unusable.

4. BIA Organizational Structure, Function, and Operational Deficiencies Freq. 67

The Bureau of Indian Affairs operates in a schizophrenic manner because it has conflicting goals. It is charged with the responsibility of managing all Indian affairs and it is charged with Indian self-determination which seeks to place the management function at the local tribal level. An organization cannot carry out goals which are in conflict with one another.

The Indian Self-Determination and Educational Assistance Act of 1975 (P.L. 93-638) intended that management of Bureau programs and functions be transferred to Indian tribes. In the last 10 years of Indian self-determination, the Bureau has managed to contract Bureau programs and functions to tribes at the rate of 1.5% of budget per year. With generally increasing budgets, increased contracting has not resulted in significant increases of P.L. 93-638's share of the budget. Regulations written by the Bureau make it extremely difficult to contract programs and functions which are not social, educational, or welfare oriented programs. Management functions associated with lands and natural resources have been retained by the Bureau. Moreover, the General Accounting Office found that Indian employees within the Bureau of Indian Affairs actively resist contracting of functions to tribes because the federal employees fear loss of their jobs.

The Critical Path to Failure Analysis of federal programs and administrative systems found a great number of organizational, functional, and operational deficiencies within the Bureau of Indian Affairs. A list of deficiencies is set forth below:

- Lack of top management direction
- Inept decision making processes
- Unwillingness of area and agency staff to implement the intent of the Indian Self-Determination Act
- Fear of losing jobs to self-determination
- Failure to modify structure to meet needs of Indians
- Lack of Congressional support for reorganization
- Failure to reduce agency size or eliminate area offices
- Ineffective line and staff authorities
- Failure to hold staff accountable
- Unwillingness of area offices to permit tribal autonomy
- Unwillingness to accept tribal economic development planning
- Lack of responsiveness to tribes
- Ineffective personnel policies and procedures
- Failure to remove incompetent BIA staff
- Ineffectiveness of Indian preference
- Lack of expertise by personnel in technical areas
- High staff turnover
- Overcentralization of education field staff

Beyond these deficiencies there are additional problems with the financial management system, the information resource management system, banded budgeting system, contracting and procurement system, and overlapping authorities between program management and administrative management. These systems are either in a state of deterioration or mismanagement. The fact that the Bureau could not certify that its systems were in compliance with the Federal Financial Managers Integrity Act, nor with OMB A-123, indicates that a serious state of asset risk exists throughout the organization.

After reviewing 75 studies on the Bureau of Indian Affairs, conducted over a 25 year period, the American Indian Policy Review Commission (AIPRC) found:

> A review of the findings of each of these studies points to problems in administration of the Bureau programs which are directly related to the

> organizational structure of the Bureau. The layered system of administration which exists in the Bureau means that out of every dollar targeted for Indian programs, the costs of administration for each level of Bureau organization must be extracted first. Estimates of the percentage of each Indian dollar which is used to administer the BIA organization range from 78-90 percent. After administrative costs for program operation have been extracted at each level, there is only a small amount of funds left to operate a program at the reservation level, often too small an amount to effectively deliver services.

The conditions that existed in 1974, when the AIPRC was established, are not much different today. The Commission has found that approximately 48% of fiscal year 1986's budget request will be directed toward supporting the 14,000 BIA employees' personnel and administrative costs! An undetermined additional amount will be consumed to underwrite BIA travel and operating expenditures at the central, area and agency level.

5. Excessive BIA Regulation Freq. 59

Excessive regulation, or "Red Tape", was repeatedly identified in the Commission hearings as an obstacle to Indian reservation economic development. Representatives of the oil and gas industry criticized the unresponsiveness of the Bureau of Indian Affairs, its inconsistent procedures, and the delays which its involvement produced. The costs of dealing with the bureaucracy are so high as to be prohibitive. There is a reluctance throughout the energy industry to deal with Indian reservations. This reluctance also exists for commercial bankers who require lending guarantees from the Bureau of Indian Affairs. The regulation and time delays are such that fishing loans for the herring season in May are made in August, and fishing loans for the salmon season in July are made in September.

Inconsistent policies, time-consuming procedures, different interpretations among bureaucratic layers, need for numerous approvals, and paperwork burdens raise the cost of doing business with Indian tribes. The degree of regulation is so great that business investment is actually deterred.

6. BIA Education and Training Weaknesses Freq. 55

Under the Indian School Equalization Program, 42,535 Indian students were served by 210 BIA or BIA-contract educational facilities in 1983, at a cost of $205,323,245. This reflected a per pupil cost of approximately $4,827. Only 61, or 29% of these facilities were under contract to Indian tribes or Indian organizations. What is notable from the 1986 budget request justification is that proposed education initiatives do not include enhanced Self-Determination Act contracting of schools to Indian tribes. Moreover, it projects a decline in the number of contract schools from 61 to 57.

Under the Special Higher Education Program, there were 270 Indians enrolled in critical professions such as law, medicine, natural resources & related fields, engineering and business administration. About 14% of the students were enrolled in natural resources and related fields, engineering, and business administration. More than 44% of the students were enrolled in the law program, which for the period 1970-1984, had an average completion rate of 47%, in contrast to the law, without any showing that this field is important or effective. With a success rate of 47%, 63 Indian law students will not complete their course of study. At $9,283 per student, $584,829 will be spent in a cost-ineffective manner. These funds could have supported 90 Indian students in all other graduate programs where the completion rate is higher and where the professions are more adaptable to Indian business development needs. Similarly, BIA support for the Institute of American Indian Art, Haskell Indian Junior College and Southwestern Indian Polytechnic Institute average $4,500 per student. However, when the overhead for operating these institutions is spread over the student population, it costs much more for education there than in all other graduate programs. The BIA fails to invest limited educational resources in an effective manner. Much greater numbers of Indian youth and adults could be educated or trained if attention were paid to costs and effectiveness considerations.

In 1984 approximately 28% of the BIA budget was contracted under P.L. 93-638. Of the 72% of budget not contracted, many programs and functions could be contracted. Yet, BIA only budgeted $1.6 million for training and technical assistance. Moreover, while 73% of all reservations and villages have 500 or fewer resident members, small tribes receive only 20% of the self-determination budget for core management. Without better budgeting for training and technical assistance, and for small tribe core management, Self-Determination Act contracting cannot succeed. Furthermore, the absence of a statistically derived overhead cost rate continues to deter tribal contracting, since tribes have fewer resources to carry out contracted programs than the Bureau has, when such overhead rates are not included.

In the area of vocational training and job placement, the BIA spends an average of $11,500 per student trained and placed in employment, as compared to $1,147 per Indian placed through its direct employment program.

It is apparent that BIA conducts no analysis of its programs in terms of education and training outcomes. Nor does it make effective efforts to contract education and training program functions to tribes. Budget justifications succeed at budgeting for continued BIA management.

7. Incompetent BIA Technical Assistance Freq. 53

Bureau of Indian Affairs technical assistance is either inadequate or incompetent in the opinion of many witnesses who testified before the Commission. In technical fields such as forestry, mining, fishing, and agriculture, technical assistance is inadequate. In fields dealing with credit, finance, or business, it is incompetent. In fields dealing with Bureau programs or administrative systems, technical assistance is inadequate, incompetent or unresponsive to tribal needs.

The BIA's institutionalized point of view about business or business development intrudes or interferes with tribal planning and decision making. Frequently, advice given by private business to tribes is overruled by the "technical expertise" of Bureau employees who have no experience or knowledge in business principles or management.

8. BIA Credit and Finance Program Deficiencies Freq. 52

A number of credit and finance barriers were identified to the Commission by witnesses. Management and technical assistance activity is provided for in the Indian Finance Act and the Indian Loan Guaranty and Insurance Fund, yet the BIA fails to provide adequate technical assistance to potential Indian borrowers, or to current borrowers. The BIA uses appropriations for loans to Indians to support its administrative costs, carrying an overhead far in excess of what a financial institution of the same size and portfolio would have.

Of the $85,506,500 in the Revolving Loan Fund, $50,749,500, (@ 60%) was loaned to tribal enterprises, in comparison to $11,407,500 (@ 13%) to individual Indians. Financial assistance is biased in favor of tribal enterprises and does not provide the kinds of support individual business requires. Restrictive "on or near" a reservation criteria for loans, absence of bonding authority, lack of management and technical assistance, exclusion of tribal members whose tribes have credit programs, lack of information about lending programs, poor screening of applicant tribes, and incredible time delays all work to undermine the effectiveness of BIA credit and finance programs.

Independent cooperatives and associations received only $3.5 million in loans, approximately 4% of the total outstanding. Practically no support is provided to independent business associations. Furthermore, considering the high degree of land ownership fractionation and the checkerboarding of Indian reservations, only $4.8 million (@ 5%) has been loaned for land acquisition.

The Critical Path to Failure Analysis of federal programs and systems indicated that BIA credit and finance obstacles included: lack of consistency in interpretation of guidelines and policies, poor turn around time for credit applications; lack of knowledgeable reviewers, lack of specialized staff, $100,000 credit limitation, failure to differentiate first time borrowers from successful borrowers, equity requirements, and poor access to the private banking system.

9. BIA Contracting and Procurement Deficiencies — Freq. 35

Buy-Indian contract deficiencies by the Bureau of Indian Affairs operates as a major impediment to Indian businesses. Buy-Indian Act regulations require that an Indian organization be 100% owned and controlled by Indians. Such a requirement limits the ability of Indians to obtain capital, management and technical expertise by offering participation to private investors. The Small Business Administration and other programs only require 51% ownership by minorities. Instead of helping individual Indians to do business, the BIA wrote highly restrictive regulations.

In its efforts to comply with OMB A-76 contracting of commercial and industrial activity, the BIA has not provided that contracting of such functional activities be done through the "Buy-Indian" or P.L. 93-638 process. While cost of margin estimates may be developed through the normal A-76 process, that process should not be operated in a manner that deprives Indians of contracting opportunities.

Many witnesses testified that the Bureau of Indian Affairs actively avoided using the Buy-Indian Act in its procurements. Other complaints focused on failure to properly utilize the Buy-Indian Act for subcontracting to Indian construction contractors for construction projects made possible by transfer of Surface Transportation Act funds to the Bureau of Indian Affairs.

Burdensome bidding procedures, restrictive regulations, unrealistic performance bonding requirements, inflexible indirect cost rates, BIA's exemption from the Prompt Payment Act, and failure to support Indian preference, were frequent complaints.

10. Alaska Native Claims Settlement Act Problems Freq. 29

The Alaska Native Claims Settlement Act of 1971 (ANCSA) was intended to resolve the land rights of Alaska's eighty thousand Native inhabitants. The Act created a mechanism for Native selection, administration, development and alienation of forty million acres of land, and expenditure, investment, and distribution of an Alaska Native Fund of $462.5 million in Congressional appropriations and $500 million in oil royalties.

Under ANCSA, Natives are permitted to enroll and be issued stock in one of thirteen regional corporations and in one of more than two hundred village corporations, according to their place of residence or origin. The corporations are delegated the task of selecting for their own use, lands in twelve geographic regions and in the vicinity of Native villages. In addition, the corporations are given the responsibility for administering their portions of the Alaska Native Fund, including distributing funds to Native stockholders.

According to the terms of ANCSA, Alaska Natives are entitled to receive approximately forty million acres of federal public lands. A total of thirty-eight million is to be selected by the Native villages (twenty-two million) and the regional corporations (sixteen million). The remaining two million acres are set aside to provide for pending Native allotment applications, historic sites, and other purposes. Any of the two million acres not conveyed will be allocated to the regional corporations based on population.

An important feature of ANCSA is the fact that all lands selected by the Native corporations are patented in fee simple with few restrictions on alienation. Decisions by the Native corporations to lease or sell their land need not be reviewed by the Department of the Interior. There are, however, restrictions on the alienation of the stock in Native corporations.

In the course of its study, the Commission discovered numerous problems associated with the implementation of the Act. The principal problems identified centered around undue delays on the part of Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) in conveying, surveying, and issuing patents and easements. These bureaucratic failures adversely affect the rights and benefits of Alaska Natives under the Act and produce a detrimental effect on private sector development.

Another problem in implementing the Act's provisions concerns the BLM classification of navigable and non-navigable waterways. As an incident of statehood and pursuant to ANCSA, the State of Alaska has title to most lands beneath navigable waters. In the event of a controversy over classification, litigation in federal district court is necessary to resolve the matter. This is unduly burdensome to Natives in that title to a significant percentage of their acreage entitlement is dependent upon the administrative guess of BLM as to whether title to certain submerged lands did or did not pass to the State of Alaska and is therefore not susceptible to conveyance.

Problems have also arisen with regard to the determination of federal and state easements over Native allotments. The State of Alaska has protested over 5000 Native allotments as infringing on easements necessary for access to federal and state lands.

The BLM's delay in issuing conveyances has had an even more immediate negative effect on the financial well-being of Native corporations. Of 70 village corporations examined, 38 operated profitably for three years (1980-82) while 32 incurred before-tax losses during the three years. The primary reason for the losses was attributed to the delays in land conveyances. The corporations' financial difficulties, unless corrected, appear likely to worsen after 1991 when their lands become subject to taxation. Because the Act contemplated a twenty-year period of tax exemption, while the Native corporations were permitted to fully develop, it would be a cruel hoax if the land conveyances, to which they were immediately entitled, were to consume most, if not all, of that time frame. (Another prospective ANCSA problem identified by the Commission concerned the Act's post 1991 removal of restrictions on alienation of the stock of Native corporations. Concern was expressed that stock and control of Native corporations would fall into the hands of non-Natives after 1991.)

Passed in 1971, ANCSA extinguished the Alaskan Allotment Act of 1906. In 1984, however, approximately 9000 claims originally filed under the 1906 Act remained unresolved before BLM. The State of Alaska is now filing protests to the allotment process.

The bureaucratic delays caused by BLM and USFS have not only served to frustrate the expectations of Native people, but they have also inflicted direct and indirect financial losses on the Native corporations. Thirty-two Native corporations have reported legal expenses in excess of $50,000 each that were incurred in the course of administrative appeals and litigation over the implementation of ANCSA. Another forty-six reported that appeals and litigation have had an adverse impact, from moderate to very great, on their corporations' economic development. It appears that the bureaucracy's failure may lead to ANCSA's and the Native's as well.

11. BIA Economic Development Initiative Freq. 22

Testimony was presented to the Commisison which indicated that the BIA Economic Development Initiative was poorly understood by those entrusted with its management The Initiative offers to provide, as a grant, 25% of project development costs to a tribe if 75% of the remaining project development costs are contributed from tribal capital resources or from private sector capital sources. The 75% contribution requirement has created a number of disputes. Small tribes testified that a 75% capital contribution by them was prohibitive and complained that the Initiative is really focused on assisting major tribes. The 75% contribution requirement was recently interpreted to mean debt rather than equity in the case of private investors. Private investors are prohibited from contributing plants, equipment, or other capital towards the 75% unless there is a mortgage on the capital or other lien. Federal guarantees or other federal capital cannot be used toward the 75% contribution. The Initiative focuses on tribal enterprises, not on individual Indian business development.

Instead of developing rate of return criteria for investments, the BIA developed restrictive eligibility criteria favoring large tribes, contrived artificial distinctions between debt and equity participation by private investors, and employed the usual "on or near" reservation requirements. The Initiative was written as a grant matching program, not as an economic development initiative. Moreover, the program initiative has been characterized by the same unresponsiveness, lack of timeliness in project processing, and lack of business knowledge that exists in other BIA credit and finance programs. The Initiative is in danger of being operated as a discretionary grant program.

FEDERAL OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT

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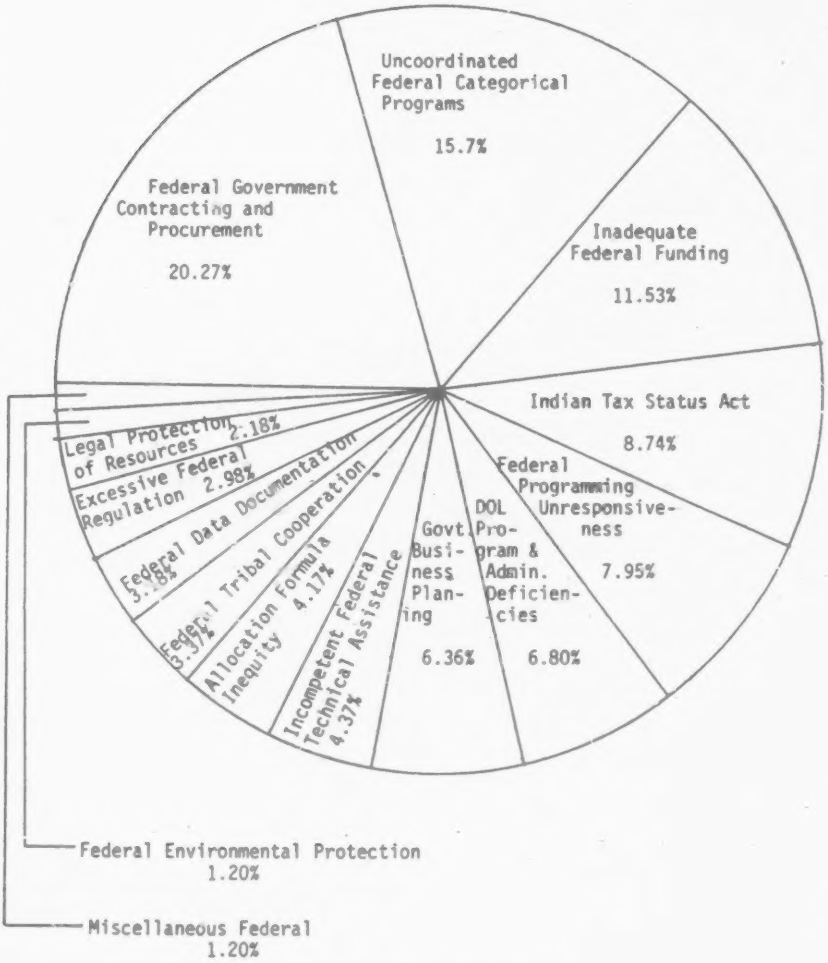
COMPOSITION OF FEDERAL OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT



1. Federal Government Contracting and Procurement Policy, Regulation, and Procedures Freq. 102

Government contracting and procurement policies, regulations, and procedures are a significant obstacle to Indian reservation economic development. This is the major federal obstacle.

The Department of Defense Buy-Indian Act, authorized since Fiscal Year 1982, has not been effectively implemented. The memorandum of understanding signed with the Small Business Administration in November 1983 to certify 75 new Indian businesses as SBA 8(a) minority businesses has produced little success. Minority Business Development Agency technical assistance has not achieved significant results on Indian reservations. Federal procurement programs in departments and agencies have nonexistent or insignificant Indian business participation.

Some top federal administrators have expressed concern about making changes in procurement policies, regulation, and procedures to make access by Indian firms equal to those of other minority firms, but bureaucratic networks which favor other minority businesses over Indian businesses have impeded progress.

Inadequate subcontracting; exclusion of Indian "tribes" as eligible entities, exclusion of tribal enterprises not chartered under state laws, inconsistency among federal procurement regulations, cumbersome bidding procedures, inflexibility of SBA's certification of eligibility requirements, inadequate technical assistance, poor loan servicing and monitoring, Davis-Bacon wage rate requirements, and failure to set aside or support the setting aside of manageable procurements for Indian businesses are major barriers to Indian economic development.

Within the Small Business Administration there seems to be widespread inconsistency and confusion among field offices and higher levels as to who is eligible to be considered as an Indian, whether tribal enterprises are eligible, how to handle issues of federal, state or Indian-tribal government charters for Indian enterprises, what the composition of the board of directors should be for such enterprises, who to include in determining economic disadvantage, and how "management of daily operations" should be determined.

2. Uncoordinated Federal Categorical Programs Freq. 79

More than $2.6 billion are appropriated annually for Indian programs or programs and services which benefit individual Indians. Federal Indian domestic assistance is offered by departments such as Interior, Health and Human Services, Education, Labor, Housing and Urban Development, Treasury, Commerce, Justice, Transportation and Energy. Independent agencies such as the Equal Employment Opportunity Commission, National Foundation on the Arts and the Humanities, and Office of Personnel Management, among others, also provide domestic assistance.

There are nearly twenty programs in a host of departments and agencies which are providing business development assistance to Indian reservations. These programs demonstrate a high degree of overlap and fragmentation. The structure of federal programming is such that its categorical nature makes it difficult for program recipients to succeed. Conflicting program goals, policies, regulations, procedures, reporting requirements, and funding and lending cycles make it difficult for Indian tribes to succeed at program coordination when the federal government itself is so uncoordinated.

Programs see compliance, not profitable activity, as the determinant of a successful project. Federal personnel are not competent at assessing the needs of business. The technical assistance which is provided is generally programmatic or compliance oriented.

The burdens of coordination are placed on Indian grantee recipients because federal programs which deal with land, labor and capital (elements of an economic production function) are not able to coordinate among themselves. The lack of federal coordination creates confusion, delay, waste and unnecessary costs to business activity.

3. Inadequate Federal Funding Freq. 58

There are three basic problems with the pattern of federal funding to Indian tribes. The first problem is that funds are not targeted to economic development activity. Funds are targeted at social, educational, health and welfare services because reservation economies are so underdeveloped that they cannot support basic governmental services. Instead of focusing federal funding on economic development which could support tribal government services, federal funding patterns encourage dependency.

The second problem is that entrenched bureaucracies fight for their prerogatives by budgeting for Indian failure. Neither the Bureau of Indian Affairs nor the Indian Health Service budget for Indian self-determination. Incentives to self-determination are not part of the budgetary and funding process.

The third federal funding problem is that every federal program has a funded constituency which competes for finite resources. Since profitable business is not funded by federal programs, there is no voice for profitability.

Since it is the federal government which maintains trust restrictions on Indian assets and makes access to private capital difficult, Indian tribes reason that it should be the federal government which provides capital to offset those restrictions.

4. Indian Tribal Governmental Tax Status Act Freq. 44

The Indian Tribal Governmental Tax Status Act of 1982 enables Indian tribal governments to be treated as states or political subdivisions of states for various sections of the Internal Revenue Code.

One provision of the Act provides that Indian tribal governments may issue tax-exempt revenue bonds which can be used to support basic infrastructure or community development construction. Tribal governments do not have the technical capability for properly utilizing and benefiting from this provision without technical assistance.

Tribal governments also contend that the absence of a provision granting tax-exempt treatment for the issuance of tribal industrial development bonds impedes their efforts to raise capital for tribal government business development. State and local governments are given such treatment. This puts tribal governments at a disadvantage vis a vis these other governments.

The Administration has supported tax-exempt treatment for industrial development bonds by tribal governments.

5. Federal Programming Unresponsiveness Freq. 40

Federal programming is focused on social, educational, health and welfare needs of Indian individuals. Funds for their benefit are channeled through tribal governments. To the extent that federal programming does focus on economic development, it concentrates primarily on economic development controlled by tribal government. And, to the extent that funds for economic development are channeled to tribal governments, the focus is on large tribal governments and on tribes which have substantial energy or natural resources. Since 75% of all reservations and villages have 500 or fewer member residents, economic development resources are directed toward the least number of tribes.

Federal programming for economic development is biased in favor of reservation size, physical resource inventory, and tribal government. It is not biased in favor of financial rate of return, it does not favor individual Indian entrepreneurs, and it does not understand the needs of business.

6. Department of Labor Programmatic & Administrative Deficiencies Freq. 34

The main deficiencies cited by witnesses before the Commission were: fragmentation of authority over Indian training programs, incompetent federal personnel, inadequate technical assistance, transition problems from CETA to JTPA, and local coordination requirements relating to other federally sponsored training efforts.

Approval, implementation and close-out of JTPA grants to Indian tribes were identified as fragmentation deficiencies which impose undue complexity and delay. The reductions-in-force within Labor resulted in the placement of personnel in the Indian training program who did not fully understand Indian labor training problems. The movement to private sector based training, away from tribal government employment and training, created some transition difficulties on the local level. The requirement that local programs coordinate with other federal training efforts funded by the Bureau of Indian Affairs, Department of Education's Office of Vocational and Adult Education, Department of Housing and Urban Development, and Department of Health and Human Services' Administration for Native Americans is a problem when these federal level agencies do not coordinate well. Problems with census data accuracy and allocation formula distribution were also identified with respect to the allocation of funds between urban and reservation Indians.

The most persistent complaint, however, was the inadequacy of technical assistance. Designing programs which focus on private sector labor markets, operating such programs, and producing employment results are areas where technical assistance is absent. Providing expert technical assistance from private sector sources would improve Indian training program design and results.

7. Government Business Planning Freq. 32

At the planning threshold, Congress does not understand what causes Indian social and economic underdevelopment. Congress responds to the social consequences of economic underdevelopment with categorical programs and safety nets. It is organized into jurisdictional authorizing and appropriating committees which by their nature have institutionalized points of view. Bureaucratic programs report to their respective committees and reflect the same institutional biases. Problems and solutions are characterized in bureaucratic or political rhetoric. What government does not realize is that a web of interconnected problems exist such that the option of trying to solve each problem on its own cannot succeed.

The political focus on specifics and specific solutions, scepticism that anything fundamental can be done, an anti-planning bias against systems modeling, model integration and legislative action, and the inability to create consensus all work to perpetuate the problems of Indian social and economic underdevelopment. Government planning is non-planning because it fails to understand the interrelationships among many varied governmental actions and their impacts on the Indian reservation universe.

An Indian reservation can be viewed as a controlled experiment whose expected results have become distorted through the uncontrolled introduction of foreign programs. In an effort to restore stability and to achieve desired for results, new programs are introduced. In the process, phenomenological and pathological activity occurs for which new programs are designed. The social experiment fails because of the irresponsibility of its planners, not because of the moral weaknesses of the victims which it creates.

Government planning deals with the here and now of every fiscal year. It cannot conceive that relief may be needed, not new reactive program impacts.

8. Incompetent Federal Technical Assistance Freq. 22

Federal technical assistance is incompetent to support the needs of Indian business development. Federal personnel are not experienced in business. They are recruited and hired for their experience in particular occupational series required for programmatic or administrative system functioning. Technical assistance consists more of compliance activity, and monitoring for compliance, than it consists of providing quality business technical assistance.

Technical assistance for compliance with program guidelines is more interested in program success than it is in business profitability. It is better to be unprofitable and to continue to receive free grant assistance, than it is to be successful and to incur the wrath of the compliance bureaucracy.

"Expert" technical assistance focuses on how to write successful applications for grant programs, how to comply with grant programs, how to write measurable objectives and report on program success, and how to train staff in program operations. "Expert" technical assistance knows little of industrial engineering, hydrology, marketing, product design, etc.

9. Federal Allocation Formula Inequity Freq. 21

The shift from categorical grants to block grants based upon population formulas has intensified competition between states and tribes. Where states are conduits to tribes, tribes complain of population census data which determines the basis for their allocation, and they complain of the delay in the distribution of funds by states to them.

10. Federal-Tribal Cooperation Freq. 17

The structure of the federal system is welded together by categorical programs, unidimensional regulations, burdensome compliance and reporting procedures, and poorly targeted budget allocations. In such a system of programs, it is difficult for federal and tribal governments to cooperate effectively with each other. Because both are governments, it is difficult for them to cooperate in the building of a viable Indian reservation private sector.

The Administration for Native Americans (ANA) introduced an imaginative concept in its Social and Economic Development Strategy (SEDS) approach to funding, insofar as it sought to effect cooperation on the local level, focusing on economic development synergy and outcomes. Unfortunately, the Pay-Off Ratios Study of ANA grantees discovered that ANA success was being measured in terms of how many other government grant proposals ANA funds could be used to write. Basing government program effectiveness on how many grant subsidy proposals a grantee can write does not approach fulfillment of the SEDS concept. It does reflect a high degree of cooperation on government programming, but not much on the creation of an independent business sector on Indian reservations.

Cooperation or partnership in the development of a private sector is difficult when federal programs focus on creating more government dependency, not less. Cooperation becomes negotiation of grant terms. Neither cooperates with the other to build a local reservation private sector made up of independent businesses. Federal funds are used to underwrite grantsmanship and delegations of tribal government officials who travel to Washington to create political leverage for more program funding.

There is practically no joint federal-tribal cooperation on the development of an independent private sector on Indian reservations.

11. Federal Data Documentation Freq. 16

There is no central data bank where one can obtain government-wide information about Indian population, resources, budgets or economic activity. Information is diffused throughout many agencies which do not share information in any consistent manner. Data is collected for parochial purposes. There is also a lack of clarity in the data collected, probably because data collection is inconsistent and its methods unreliable. As a consequence, the data base is really too weak to permit good data analysis.

For example, an education program will report the number of students funded and program budget. It does not report data which make program analysis possible, such as reading scores, computation or competency scores. Another example is soil classification surveys. The BIA reports that most of the land it holds in trust has not been classified. Therefore, a data base for analyzing land use does not exist. The same is true of timber inventories.

Incomplete data bases make it impossible to analyze social and economic investment policies in terms of their success in the real world. All one can say say is that budgets are growing and unmet need is growing.

Federal data documentation weaknesses make it clear that no model exists for measuring progress in Indian economic development.

12. Excessive Federal Regulation Freq. 15

Excessive program compliance requirements impose burdensome costs on Indian economic activity. A great deal of resources are consumed in administrative costs associated with bureaucratic red tape. Program complexity, compliance, and reporting increase the costs of doing business. Excessive regulation creates delay, costs money, and discourages private investors. The plethora of guidelines, layers of approvals, workshops on compliance, and overlapping regulation meet the needs of the government, not business.

13. Legal Protection of Indian Natural Resources Freq. 11

There is competition between enforcing Indian trust responsibility and the public interest within the Interior Department, competition between Interior and Justice on case theory, and competition within Justice on case management where it simultaneously sues and defends the United States. This competition contains the potential for legal conflicts of interest to arise.

14. Federal Environmental Protection Freq. 6

The National Environmental Protection Act requires that environmental impact statements be completed before any projects can be undertaken. Such regulation is seen as costly and intrusive. Delegating NEPA enforcement to Indian tribes and permitting their determination of when a statement should be filed would decrease costs in appropriate cases.

Furthermore, complex and burdensome requirements exist for applications to the U.S. Army Corps of Engineers for river front permits. An expedited process would reduce project development costs.

15. Miscellaneous Federal Freq. 6

Two government policies have been identified as obstacles to Indian reservation economic development. These are: fear of "termination" by Congress because of the failure of Congress to repudiate or repeal House Concurrent Resolution 108. The second concern is that enterprise zone legislation will not provide for Indian reservation designation, thus depriving tribes of the ability to offer site location incentives.

STATE AND LOCAL GOVERNMENT OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT

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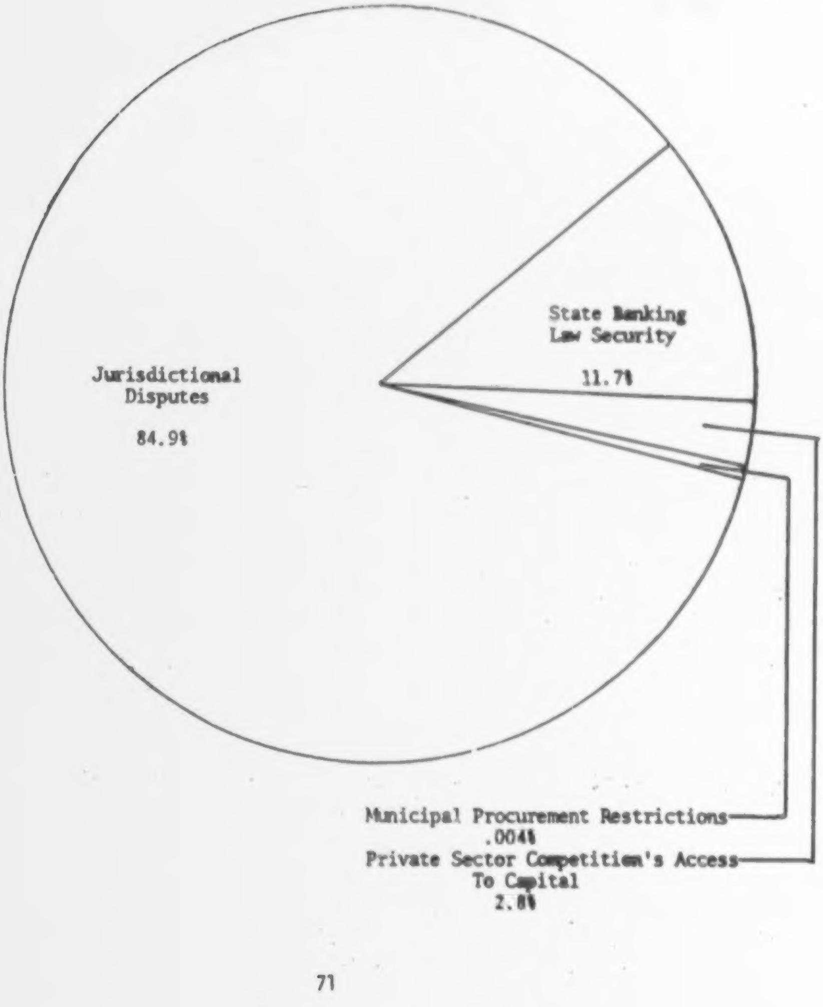
COMPOSITION OF STATE AND LOCAL GOVERNMENT OBSTACLES
TO
INDIAN RESERVATION ECONOMIC DEVELOPMENT



I. Jurisdictional Disputes Among Tribes, States, and Local Governments Freq. 209

Generally, states do not have jurisdiction over matters involving only Indians on an Indian reservation, unless there is specific legislation by Congress permitting such jurisdiction. "In all other cases, the state has jurisdiction unless there is involved a subject matter of special federal concern," (Felix S. Cohen's Handbook of Federal Indian Law, (1942 ed.) at p. 121). As a consequence, states generally have jurisdiction over non-Indians within the borders of an Indian reservation located within the state. But, Indian tribes also have civil jurisdiction over non-Indians within the borders of their reservations. In a landmark case, Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), app. dism., 203 U.S. 599 (1906), the court held that tribes had jurisdiction over non-Indians residing on non-Indian lands within the borders of an Indian reservation. This case is still considered good law:

> ...It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. (pp. 95-952).

In most cases, state, local and tribal governments have concurrent civil jurisdiction over non-Indians within the borders of an Indian reservation.

In cases where the situs, person and subject matter create concurrent civil jurisdiction, the laws of state, local and tribal governments all have effect. Where there is a conflict of laws, a non-Indian must comply with both laws. In such cases, a non-Indian may pay two sets of taxes, business license fees, purchase two sets of vehicle license plates, comply with two different zoning ordinances, and operate with two sets of civil rights before non-Indian and Indian courts.

Concurrent legislative jurisdiction over non-Indian lands and non-Indian persons has produced considerable litigation because of the high degree of non-Indian residence on Indian reservations. The Bureau of the Census estimates that 50.8% of the persons living on Indian reservations are not American Indians. Since a great deal of reservation economic activity involves non-Indians, concurrent legislative jurisdiction becomes competitive legislative jurisdiction.

Competitive jurisdiction exists in a number of areas: taxation of sales, business and amusement activity, severance taxation of subsurface minerals, non-Indian personal income taxation, indirect taxation of Indian property, fish and game regulation, water regulation, zoning, etc.

Historically, Indian tribes did not exercise much legislative jurisdiction over non-Indians. In an era of tribal sovereignty, tribes have begun to exercise their governmental authorities more widely over non-Indians, to the extent that tribes seek to regulate economic activity which involves non-Indians or non-Indian business organizations.

There are six generalized responses to enhanced tribal regulation of economic activity which affect non-Indian businesses. One response is a feeling of taxation and regulation without representation. The second response is a fear of tribal government and tribal courts "taking" non-Indian property without due process of law. The third response is a perception of risk which deters investment. The fourth response is litigation challenging jurisdiction which raises the costs of doing business. The fifth response is acquiescence and continued operation of the business. The sixth response is acquiescence and business failure because of the higher costs of doing business.

In areas where states, local governments and tribal governments have negotiated agreements respecting jurisdiction, there are significantly reduced levels of litigation. In other areas, litigation is frequent and business costs are higher.

2. State Banking Law Security Freq. 29

State financial institutions are usually limited to approved lists of securities for loans. Since Indian property is held in trust and can not be mortgaged, financial institutions feel that they have little protection for their loans without federal guarantees. Commercial banking practice is seen as unresponsive, reluctant, and even discriminatory since it is limited both by state law and the prudent man rule.

3. Private Sector Competition's Access to Capital Freq. 7

Tribal governments are the major promoters of economic activity on Indian reservations. They frequently see themselves in competition with Indian and non-Indian private sector activity. Tribal governments believe that successful local business activity exists in private hands because private business has better access to capital. Since the private sector can offer mortgages on property and other secured interests, it is seen as having a superior advantage.

Tribal governments also experience competition from existing private sector activity when tribes capitalize businesses to produce the same goods or services. Since most goods and services are already being produced by some business, tribes see themselves at a disadvantage in starting-up a competitive business. The competitive edge which existing business is claimed to have is that of better access to capital.

4. Municipal Procurement Restrictions Freq. 1

It is believed that municipal procurement procedures discriminate against Indian tribal businesses which seek to do business off the reservation as minority business enterprises.

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POPULATION PROFILE

POPULATION

In 1980 the Bureau of the Census reported there were 1,534,000 Native Americans living in the United States. The Bureau of Indian Affairs estimated that 755,201 American Indians and Alaska Natives lived "on or near" Indian reservations, trust lands, or Native villages. Census estimated that 631,574 Indians and Alaska Natives lived on Indian reservations or in Native villages. The principal difference between the two estimates is the Bureau of Indian Affairs included most of the Indian population in Oklahoma (120,525) which did not live on an Indian reservation, but did live "on or near" trust lands. The tables below show the number, location, and percentage distribution of the BIA reservation Indian population and the Bureau of the Census state Indian population for 27 of 50 states. Approximately 90% of the BIA reservation Indian population is concentrated in 11 states.

TABLE 1*
RESERVATION INDIAN POPULATION

Rank	State	Population	Percent Distribution
1.	Oklahoma	159,852	21.17 %
2.	Arizona	154,818	20.50 %
3.	New Mexico	105,973	14.03 %
4.	Alaska	64,970	8.60 %
5.	South Dakota	46,101	6.10 %
6.	Washington	39,726	5.26 %
7.	Montana	27,529	3.65 %
8.	California	23,625	3.13 %
9.	North Dakota	21,552	2.85 %
10.	Wisconsin	18,279	2.42 %
11.	Minnesota	18,260	2.42 %
12.	New York	11,167	1.48 %
13.	Nevada	8,259	1.09 %
14.	Utah	7,140	0.95 %
15.	Idaho	7,108	0.94 %
16.	North Carolina	5,971	0.79 %
17.	Michigan	5,829	0.77 %
18.	Wyoming	5,385	0.71 %
19.	Mississippi	4,487	0.60 %
20.	Nebraska	4,404	0.58 %
21.	Oregon	4,301	0.57 %
22.	Colorado	2,661	0.35 %
23.	Maine	2,261	0.30 %
24.	Kansas	2,243	0.30 %
25.	Florida	1,921	0.25 %
26.	Louisiana	717	0.10 %
27.	Iowa	662	0.09 %
		755,201	100.00 %

TABLE 2**
27 STATE INDIAN POPULATIONS

Rank	State	Population
1.	California	201,369
2.	Oklahoma	169,459
3.	Arizona	152,745
4.	New Mexico	106,119
5.	North Carolina	64,652
6.	Alaska	64,103
7.	Washington	60,804
8.	South Dakota	45,968
9.	Michigan	40,050
10.	New York	39,582
11.	Montana	37,270
12.	Minnesota	35,016
13.	Wisconsin	29,499
14.	Oregon	27,314
15.	North Dakota	20,158
16.	Florida	19,257
17.	Utah	19,256
18.	Colorado	18,068
19.	Kansas	15,373
20.	Nevada	13,308
21.	Louisiana	12,065
22.	Idaho	10,521
23.	Nebraska	9,915
24.	Wyoming	7,094
25.	Mississippi	6,180
26.	Iowa	5,455
27.	Maine	4,087
		1,234,687

Approximately 90% of the Census state Indian population is concentrated in 15 out of 50 states. Table 2 above includes Census data for non-federally recognized Indians.

The national Indian population is younger in age than is the national population. Approximately 31% of the Indian population is under 15 years of age, in contrast to 22.6% for the national population. Only 7.6% of the Indian population is over

60 years, while for the nation, 15.8% of the population is 60 years and older. The median age for Indians is approximately 23 years of age.

In 1980 there were 501,840 Indian persons, three years old and over, who were enrolled in nursery, kindergarten, elementary, high schools, and college. About one-third of the population was enrolled in a school of some kind. For the Indian population 25 years and older, one-third had not completed high school. However, more than half of this population had a high school or better education. The Indian population is younger, with more persons in school, and for those out of school, better educated than the 1970 census previously indicated. The median years of school completed in 1980 was 12.2.

UNEMPLOYMENT

In 1980, the Census reported unemployment for the American Indian, Eskimo, and Aleut population was 7.5% nationally. Census calculated the rate of unemployment by dividing the number of persons 16-65 years old who were unemployed, by the total number of persons who were 16-65 years old. Table 3 below shows the number of reservation Indians who were 16-65 years old, the number within that group who were actively seeking employment, and the average rate of Indian reservation unemployment. The unemployment rate is based upon Bureau of Indian Affairs estimates for 1983.

TABLE 3
INDIAN RESERVATION UNEMPLOYMENT

State	16 & Over	Seeking Work	Unemployment Rate
1. Oklahoma	110,137	8,716	7.91 %
2. Arizona	97,732	24,320	24.88 %
3. New Mexico	74,462	15,860	21.30 %
4. Alaska	39,352	10,822	27.50 %
5. South Dakota	26,556	6,003	22.61 %
6. Washington	25,635	8,711	33.98 %
7. Montana	17,418	4,043	23.21 %
8. California	16,281	4,999	30.70 %
9. North Dakota	13,527	3,893	28.78 %
10. Wisconsin	11,590	3,300	28.47 %
11. Minnesota	11,457	3,892	33.97 %
12. New York	8,225	2,502	30.42 %
13. Nevada	5,649	1,662	29.42 %
14. Utah	4,533	902	19.90 %
15. Idaho	4,482	1,039	23.18 %
16. North Carolina	4,152	659	15.87 %
17. Michigan	3,845	1,229	31.96 %
18. Wyoming	3,691	899	24.36 %
19. Mississippi	2,737	352	12.86 %
20. Nebraska	3,075	950	30.89 %
21. Oregon	2,754	614	22.30 %
22. Colorado	1,809	654	36.15 %
23. Maine	1,401	268	19.13 %
24. Kansas	1,341	158	11.78 %
25. Florida	1,198	241	20.12 %
26. Louisiana	464	54	11.64 %
27. Iowa	377	205	54.38 %
Reservation Total	493,880	106,947	21.65 %

If the State of Oklahoma, which has a relatively larger Indian population and higher degree of Indian employment is excepted from this list, the average unemployment rate for Indian reservations would be 25.6%, approximately five points higher than the figure indicated.

The Census estimated there were roughly 408,000 Indian persons who were living below the poverty level approximately 26.6% of the total Indian population. In 1980 12.4% of the nation's population lived below the poverty line. The unemployment rate and poverty rate for the BIA reservation Indian population appears to be twice as high as the national levels. Moreover, while the median income for the United States was $19,928 in 1980, the median income for all Indians in 1980 was $16,672. This was $3,256 or 16% lower than the national level.

INDIAN RESERVATIONS AND ALASKAN VILLAGES

The Bureau of the Census counted American Indians residing on 278 Indian reservations and Alaska Natives residing in 209 Native villages for a total of 631,574 Indian or Native persons living on 487 reservations or villages. The table below shows the percentage distribution of reservations and villages according to various levels of population. Approximately 35% of all reservations and villages have fewer than 100 persons in residence. In fact 6.4% of all reservations and villages have no population. Nearly three-fourths of the reservations and villages have fewer than 500 resident members. Less than fifteen percent of all reservations and villages have more than 2,000 resident members.

TABLE 4
DISTRIBUTION OF RESERVATIONS AND VILLAGES BY POPULATION LEVELS

Population Levels	Reservations and Villages	Percent Distribution
80,000- +++++	1	0.2 %
40,000-80,000	-	-
20,000-40,000	5	1.0 %
10,000-20,000	7	1.4 %
5,000-10,000	22	4.5 %
3,000-5,000	12	2.5 %
2,500-3,000	8	1.6 %
2,000-2,500	12	2.5 %
1,500-2,000	10	2.0 %
1,000-1,500	19	4.0 %
500-1,000	34	7.0 %
250-500	82	16.8 %
100-250	103	21.1 %
50-100	70	14.4 %
0-50	101	21.0 %
Total	487	100.00%

CLASS OF WORKER AND INDUSTRY

Of the 507,614 Indian persons who were employed in 1980, 336,463 (67%) were private wage and salary workers. An additional 26,227 (5%) were either self-employed or unpaid family workers. Federal, state and local governments employed 144,924, or 29% of those persons 16 years old and over who were employed. These figures do not include employment in tribal governments, which is elsewhere tabulated as private wage or salary employment. As a result more than 30% of Indian employment would be in the public sector.

The Table below shows national Indian employment by Standard Industrial Classification system industries. The table includes public and private sector employment, percentage distribution of employment among industries, and the rank ordering of industries.

TABLE 5
EMPLOYMENT BY INDUSTRY

RANK	INDUSTRY	EMPLOYMENT	% DISTRIBUTION
1.	Professional and Related Services	102,589	20.2 %
2.	Manufacturing	97,913	19.3 %
3.	Retail and Wholesale Trade	79,655	15.7 %
4.	Public Administration	59,655	11.7 %
5.	Construction	42,592	8.4 %
6.	Transportation	20,792	4.1 %
7.	Business & Repair Services	20,583	4.0 %
8.	Agriculture, Forestry, Fisheries	17,839	3.5 %
9.	Communication, Public Utilities	14,691	2.9 %
10.	Other Personal Services	14,251	2.8 %
11.	Insurance, Real Estate, Finance	11,258	2.2 %
12.	Mining	11,133	2.2 %
13.	Banking and Credit Agencies	5,901	1.2 %
14.	Entertainment and Recreation Services	5,057	1.0 %
15.	Private Households	4,112	0.8 %
	TOTAL	[illegible]07,614	100.00%

Approximately seventy-five percent of Indian employment is concentrated in five Standard Industrial Classification system industries.

While the industries noted in the table above employ persons from many different occupational series, the table below shows the distribution of the Indian labor force among major occupational areas in comparison to the national labor force distribution.

TABLE 6
LABOR FORCE DISTRIBUTION BY OCCUPATION

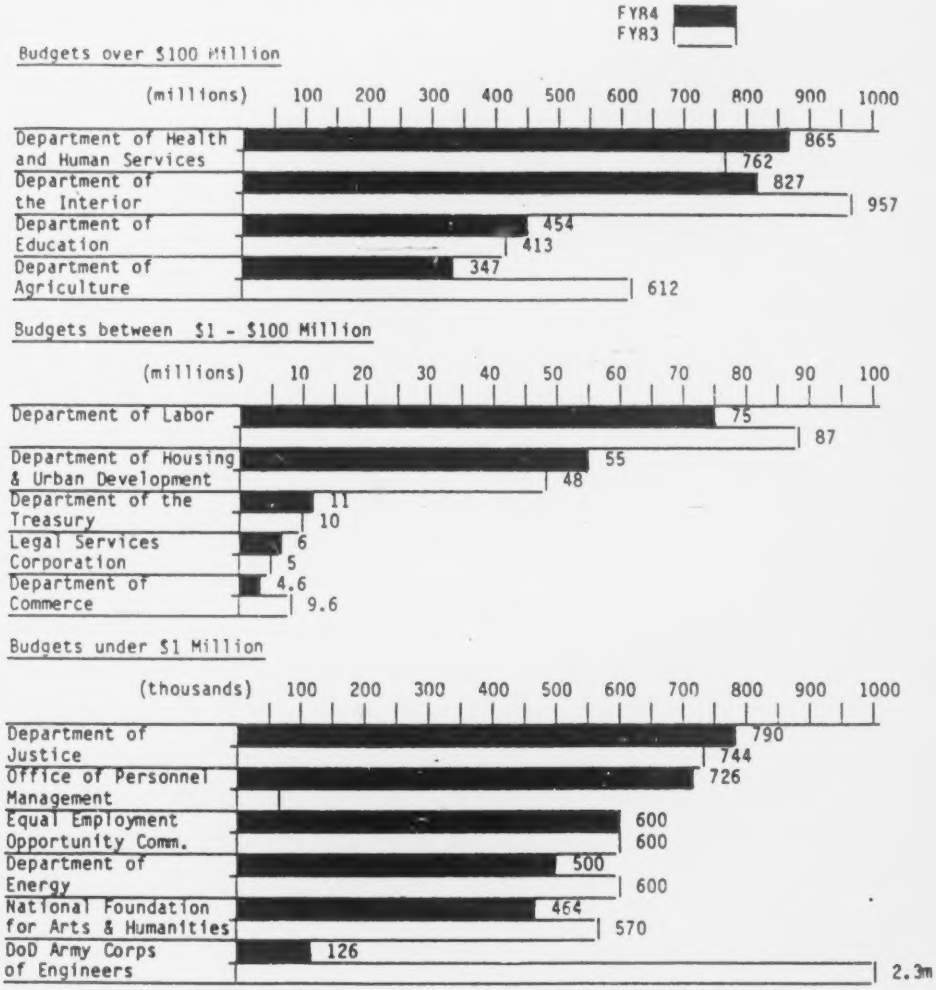
OCCUPATIONAL SERIES	INDIAN LABOR FORCE		NATIONAL LABOR FORCE	
	MALE	FEMALE	MALE	FEMALE
Managerial and Professional Specialty	7.8 %	7.3 %	22.5 %	20.6 %
Tech., Sales & Admin. Support	12.0 %	37.0 %	18.4 %	44.6 %
Service	12.4 %	25.5 %	9.3 %	18.0 %
Farming, Forestry, and Fishing	6.1 %	1.3 %	4.3 %	1.0 %
Precision Production, Craft, & Repair	23.9 %	3.2 %	20.8 %	2.4 %
Operators, Fabricators, and Laborers	30.7 %	14.5 %	24.2 %	12.3 %

Approximately 55% of Indian male employment is in skilled and semi-skilled blue collar occupations such as: precision production, craft and repair, and operators, fabricators, and laborers. Approximately 63% of Indian female employment is in lesser skilled white collar occupations, such as: technician, sales and administrative support, and services.

The health of the Indian labor force and Indian population is generally worse than national mortality and morbidity rates. The Indian and Alaska Native age adjusted mortality rates are considerably above those of other Americans for: tuberculosis, chronic liver disease, cirrhosis, accidents, diabetes mellitus, homicide, pneumonia, influenza, and suicide. In addition, they are above those of other Americans for chronic obstructive pulmonary diseases and allied conditions of malignant neoplasms, and major cardiovascular diseases. Deaths due to alcoholism are about five times that of the national average.

BUDGET BREAKDOWN
FOR FEDERAL INDIAN
DOMESTIC ASSISTANCE

BUDGET BREAKDOWN FOR FEDERAL INDIAN DOMESTIC ASSISTANCE*



* Budget figures are based on estimates and approximations.

BUDGET BREAKDOWN FOR FEDERAL INDIAN DOMESTIC ASSISTANCE

	FY83	FY84
Department of the Interior	$957,852,844	$827,690,144
Bureau of Indian Affairs	954,127,000	823,902,000
Office of Hearings and Appeals	1,751,144	1,751,144
Office of the Solicitor	1,132,000	1,162,000
Indian Arts and Crafts Board	842,700	875,000
See Attachment A for more complete breakdown.		
Department of Health and Human Services	$762,414,885	$865,483,931
Indian Health Service	679,216,000	777,000,000
Administration on Children, Youth, and Families	33,401,546	36,037,325
Administration for Native Americans	28,000,000	29,000,000
Social Security Administration	15,711,991	17,501,699
Administration on Aging	5,735,000	5,735,000
Administration on Developmental Disabilities	350,348	209,907
See Attachment B for more complete breakdown.		
Department of Agriculture	$612,572,937	$347,324,300*
Farmers Home Administration	290,110,000	12,080,000*
Food and Nutrition Service	289,110,000	309,080,000
Soil Conservation Service	20,253,000	20,253,000
Agricultural Stabilization and Conservation Service	5,842,407	*
Forest Service	3,116,000	3,291,000
Cooperative Extension Service	2,700,000	2,700,000
Rural Electrification Administration	787,000	0
Agricultural Cooperative Service	7,500	*
Foreign Agricultural Service	300	300
See Attachment C for more complete breakdown.		
Department of Education	$413,100,000	$454,000,000
Elementary and Secondary Education	316,400,000	355,100,000
Postsecondary Education	48,300,000	49,000,000
Special Education/Rehabilitative Services	30,400,000	32,200,000
Bilingual Education	10,500,000	10,000,000
Vocational and Adult Education	7,500,000	7,700,000
See Attachment D for more complete breakdown.		

* FY84 budget figures for FmHA, ASCS, and ACS are unavailable or incomplete, thus affecting the total FY84 budget for USDA.

BUDGET BREAKDOWN...(continued)

	FY83	FY84
Department of Labor	$87,264,199	$75,500,000
Comprehensive Employment Training Act	87,264,199	
Jobs Training Partnership Act		75,500,000
Department of Housing and Urban Development	$48,246,146	$55,542,500
Community Development Block Grants	34,200,000	39,700,000
Indian Housing Development Program	12,824,146	13,912,500
Urban Development Action Grants	1,222,000	1,930,000
Department of the Treasury	$10,800,000	$11,600,000
General Revenue Sharing Program	10,800,000	11,600,000
Legal Services Corporation	$5,458,629	$6,228,842
Department of Commerce	$9,691,257	$4,664,000
Economic Development Administration	8,191,257	3,064,000
Minority Business Development Agency	1,500,000	1,600,000
Department of Justice	$744,000	$790,000
Land and Natural Resources Division	744,000	790,000
Office of Personnel Management	$55,890	$726,000
Intergovernmental Personnel Programs	55,890	726,000
Equal Employment Opportunity Commission	$600,000	$600,000
Tribal Employment Rights Offices	600,000	600,000

BUDGET BREAKDOWN...(continued)

	FY83	FY84
Department of Energy	$600,000	$500,000
Council of Energy Resource Tribes Contract	600,000	500,000
National Foundation on the Arts and the Humanities	$570,525	$464,849
National Endowment for the Arts	336,694	366,000
National Endowment for the Humanities	233,231	91,717
Institute of Museum Services	600	7,132
Department of Defense	$2,317,000	$126,500
Army Corps of Engineers		

* * *

TOTAL FEDERAL INDIAN DOMESTIC ASSISTANCE	$2,912,288,937	$2,651,241,066

* * *

NOTE #1 : The above figures have been taken from programs which directly or indirectly provide assistance to American Indian populations on or off Indian reservations. Those programs without specific set-asides were estimated by people directly involved in program operations. Other agencies which did not respond to Commission inquiries by this date but which offer assistance to American Indians are the Smithsonian Institution, the Environmental Protection Agency, the Department of Transportation, the National Science Foundation and the Small Business Administration. The Commission believes estimation is that budget figures from these agencies would not significantly alter the gross totals.

NOTE #2 : These budget figures do not include procurement contracts.

ATTACHMENT A

DEPARTMENT OF THE INTERIOR

	FY83	FY84
Bureau of Indian Affairs	$954,127,000	$823,902,000
Education Programs		
School Operations	179,556,000	176,933,000
Johnson O' Malley Funds	66,929,000	26,000,000
Continuing Education	51,658,000	52,821,000
Indian Services		
Tribal Government Services	25,609,000	23,694,000
Social Services	100,187,000	99,609,000
Law Enforcement	35,972,000	34,944,000
Housing	53,298,000	0
Self-Determination Services	58,876,000	58,779,000
Navajo-Hopi Settlement Program	3,923,000	3,951,000
Economic Development/Employment Programs		
Employment Development	27,554,000	26,341,000
Business Enterprise Development	10,966,000	10,521,000
Road Maintenance	21,301,000	22,081,000
Natural Resources Development		
Forestry and Agriculture	104,236,000	76,282,000
Minerals, Mining, Irrigation & Power	15,005,000	16,406,000
Trust Responsibilities		
Indian Rights Protection	19,523,000	17,823,000
Real Estate and Financial Trust Services	28,877,000	27,531,000
Facilities Management	89,872,000	91,113,000
General Administration		
Management Administration	48,826,000	46,274,000
Employee Compensation Payments	4,582,000	6,829,000
Program Management	7,377,000	5,970,000
Office of Hearings and Appeals	$ 1,751,144	$ 1,751,144
Board of Indian Appeals		
Indian Probate Courts		
Office of the Solicitor	$ 1,132,000	$ 1,162,000
Division of Indian Affairs		
Indian Arts and Crafts Board	$ 842,700	$ 875,000

****

TOTAL DEPARTMENT OF THE INTERIOR INDIAN BUDGET	$957,852,844	$827,690,144

ATTACHMENT B

DEPARTMENT OF HEALTH AND HUMAN SERVICES

	FY83	FY84
Indian Health Service	$679,216,000	$777,000,000
Hospitals and Health Clinics		380,000,000
Contract Health Care		157,000,000
Program Management		60,000,000
Community Health Representatives		26,000,000
Dental Care		24,000,000
Alcohol Treatment Program		23,000,000
Equity Health Care		22,000,000
Sanitation		19,000,000
Maintenance and Repair		18,000,000
Public Health Nursing		11,000,000
Mental Health Care		11,000,000
Urban Health Care		8,000,000
Reimbursements		6,000,000
Indian Health Manpower		6,000,000
Health Education		3,000,000
Tribal Management		2,000,000
Immunization		1,000,000
Administration for Children, Youth, and Families	$ 33,401,546	$ 36,037,325
Head Start	32,600,000	35,200,000
National Center on Child Abuse and Neglect	396,852	298,675
Child Welfare Services	242,780	396,512
Family and Youth Services Bureau Runaway Programs	161,914	142,138
Administration for Native Americans	$ 28,000,000	$ 29,000,000
Social Security Administration	$ 15,711,991	$ 17,501,699
Office of Family Assistance Low Income Home Energy Assistance Grants #	129	129
Administration on Aging	$ 5,735,000	$ 5,735,000
Administration on Developmental Disabilities	$ 350,348	$ 209,907

****

TOTAL DEPARTMENT OF HEALTH AND HUMAN SERVICES INDIAN BUDGET	$762,414,885	$865,483,931

ATTACHMENT C

DEPARTMENT OF AGRICULTURE

	FY83	FY84
Farmers Home Administration	$290,686,730	$ 12,000,000
Water and Waste Disposal Systems for Rural Communities		
Loans	133,350,000	N/A
Grants	64,013,730	N/A
Community Facilities Loans	55,390,000	N/A
Farm Operations Loan Program	13,324,000	N/A
Rural Housing Loan Program	9,450,000	N/A
Indian Land Acquisition Loan Program	7,450,000	12,000,000
Emergency Loan Program	4,171,000	N/A
Farm Ownership Loan Program	3,433,000	N/A
Soil and Water Loan Program	105,000	N/A
Food and Nutrition Service	$289,110,000	$309,080,000
Food Stamp Program (294,000 participants)	152,000,000	152,000,000
Child Nutrition Programs	67,000,000	81,000,000
Food Distribution Program on Indian Res.	50,160,000	54,150,000
Supplemental Food Program for Women, Infants and Children	19,450,000	21,330,000
Title VI Indian Nutrition Programs	500,000	600,000
Soil Conservation Service	$ 20,253,000	$ 20,253,000
Watershed Program	16,390,000	16,390,000
Conservation Operations	3,000,000	3,000,000
Soil Surveys	625,000	625,000
Resource Conservation and Development	228,000	228,000
Agricultural Stabilization and Conservation Service	$ 5,842,407	N/A
Agricultural Conservation Program		
Emergency Conservation Program		
Water Bank Program		
Forest Service	$ 3,116,000	$ 3,291,000
Job Corps	1,675,000	1,720,000
Senior Community Service Employment Program	550,000	690,000
Forest and Plant Management Surveys	275,000	280,000
Rural Planning Fire Protection	130,000	130,000
Youth Conservation Corps	112,000	109,000
Land Management Planning	80,000	70,000
Watershed Planning	30,000	30,000
Long Range Planning	10,000	9,000
Urban Forestry	8,000	8,000
Other Forestry Assistance	130,000	130,000

ATTACHMENT C

DEPARTMENT OF AGRICULTURE (continued)

	FY83	FY84
Cooperative Extension Service	$ 2,700,000	$ 2,700,000
Smith-Lever Funds for County Agents		
Rural Electrification Administration	$ 787,000	$ 0
Electric Power Loan to Papago Reservation		
Agricultural Cooperative Service	$ 7,500	$ 0
Foreign Agricultural Service	$ 300	$ 300
Minority and Small Business Enterprise Export Program		

****

TOTAL DEPARTMENT OF AGRICULTURE INDIAN BUDGET	$612,572,937	$347,324,300

N/A = FY84 budget figure for FMHA, ASCS, and ACS are unavailable or incomplete, thus affecting the total FY84 Buget for USDA.

ATTACHMENT D

DEPARTMENT OF EDUCATION

	FY83	FY84
Office of Elementary and Secondary Education	$316,400,000	$355,100,000
Indian Education Act	64,700,000	65,900,000
Impact Aid		
Maintenance and Operations	140,000,000	195,000,000
School Construction/Repair	33,500,000	8,500,000
Chapter 1 Compensatory Education	54,300,000	59,800,000
Chapter 1 Comp. Ed. BIA Set-Aside	19,900,000	21,900,000
Chapter 2 Block Grants	4,000,000	4,000,000
Office of Postsecondary Education	$ 48,300,000	$ 49,000,000
Higher Education Act Title IV Student Aid Guaranteed Student Loans Pell Self-Help Grants Work-Study Programs	45,000,000	45,600,000
Higher Education Act Title III Institutional Aid	2,700,000	2,700,000
Higher Education Act Title IX Graduate and Professional Opportunities Program	300,000	400,000
Minority Institutions Science Improvement	300,000	300,000
Office of Special Education and Rehabilitative Services	$ 30,400,000	$ 32,200,000
Education for the Handicapped BIA Set-Aside	10,100,000	10,600,000
Education for the Handicapped	7,400,000	7,800,000
Rehabilitation Services to States	6,100,000	6,500,000
Special Program for the Disadvantaged	5,600,000	5,900,000
Rehabilitation Services to Tribes	700,000	900,000
National Institute for Handicapped Research	500,000	500,000
Office of Bilingual Education and Minority Languages Affairs	$ 10,500,000	$ 10,000,000
Bilingual Education	10,500,000	10,000,000
Office of Vocational and Adult Education	$ 7,500,000	$ 7,700,000
Vocational Education	6,600,000	6,700,000
Adult Education	900,000	1,000,000
**		
TOTAL DEPARTMENT OF EDUCATION INDIAN BUDGET	$413,100,000	$454,000,000

NATIONAL HEARINGS SITES:
INDIVIDUALS AND ORGANIZATIONS
PROVIDING TESTIMONY

NATIONAL HEARINGS SITES: INDIVIDUALS AND ORGANIZATIONS PROVIDING TESTIMONY BEFORE THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES NATIONAL HEARINGS SITES

LOCATION:	DATE:
MERIDIAN, MS	DECEMBER 8, 1983
OKLAHOMA CITY, OK	JANUARY 9, 1984
PHOENIX, AZ	JANUARY 16, 1984
BILLINGS, MT	JANUARY 30, 1984
SAN DIEGO, CA	FEBRUARY 6, 1984
ALBUQUERQUE, NM	FEBRUARY 16, 1984
ST. PAUL, MN	FEBRUARY 23, 1984
RAPID CITY, SD	MARCH 1, 1984
RENO, NV	MARCH 5, 1984
WASHINGTON, D.C.	MARCH 15, 1984
PAGE, AZ	APRIL 9, 1984
WINDOW ROCK, AZ	APRIL 10, 1984
SPOKANE, WA	APRIL 26, 1984
ANCHORAGE, AK	MAY 10, 1984
SAN FRANCISCO, CA (primarily targeted at private sector)	MAY 14, 1984
SAN FRANCISCO, CA (primarily targeted at state & local governments)	MAY 15, 1984

INDIVIDUALS & ORGANIZATIONS PROVIDING TESTIMONY BEFORE THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES

MERIDIAN, MISSISSIPPI December 8, 1984

Witnesess

Phillip Martin, Chairman, Choctaw Nation
Charles Mc Lain, Mayor, City of Philadelphia
Robert Thomas, Attorney
George Gibbon, Purchasing Agent, Packard Electric
Lester Dalme, Plant Manager, Choctaw Tribal Assembly Plant
Eddie Tullis, Chairman, Poarch Band of Creeks

Total Witnesses -- 6

OKLAHOMA CITY, OKLAHOMA January 9, 1984

Witnesses

C.O. Tillman, Chairman, Otoe-Missouria Nation
Charles Redcorn, Indian Mineral Association
Marcellous Chouteau, Chairman, Kaw Nation
M. Robert Rowell, Apache Meat Processing Company
Diane Kelly, Cherokee Nation
Billy Evans Horse, Chairman, Kiowa Nation
Jennings David Colbert, Citizens Bank of Oklahoma
Tom Cole, Office of Congressman Mickey Edwards
Bernard Kahrahrah, Chairman, Comanche Nation
George Tallchief, Chairman, Osage Nation
Jack Thorpe, Chairman, Sac and Fox Nation
Dan Little Axe, Governor, Absentee Shawnee Nation
John Thomas, Chairman, Kansas Kickapoo Nation
Gregg Symons, Vice-President, Bank of Oklahoma

Total Witnesses -- 14

PHOENIX, ARIZONA January 16, 1984

Witnesses

Paul Klores, Vice-President, Valley National Bank
Dana Norris, Chairman, Gila River Indian Reservation
Alexander Ami, Manager, Hopi Electronics
Gerald Anton, Chairman, Salt River Indian Reservation
Joyce Pipkin, Manager, Induction Billet Corporation
Fred Drye, Vice-Chairman, Kaibab-Paiute Nation
Debbie Broken Rope, Staff Assistant to the Committee on Interior & Insular Affairs
Billy Mills, Co-Founder, Billy Mills National Indian Youth Leadership Program
Ira Englander, Co-Founder, Billy Mills National Indian Youth Leadership Program

(continued)

PHOENIX, ARIZONA -- continued

Witnesses

Anthony Drennan, Chairman, Colorado River Indian Nations
Harold Joseph, Director, Office of Economic Development, Hopi Nation
Francisco Jose, Vice-Chairman, Papago Nation
Ronnie Lupe, Chairman, White Mountain Apache Nation
Ben Kill, Chairman, Fort McDowell Indian Nation
Milton Campbell, Chairman, Tonto Apache Nation
Norm Sattem, Manager, Empire Machinery Company
Ben Fisler, General Manager, Southwest Solvent, Inc.
John Thierbach, General Manager, White Eagle Enterprises
Luther Lipka, Manager, Forest Homes, Inc.
Ned Anderson, Chairman, Inter-Tribal Council of Arizona and San Carlos Apache Nation

Total Witnesses -- 20

BILLINGS, MONTANA January 30, 1984

Witnesses

Del Gage, State Senator, District 5, Montana
Charles Archambault, Archambault & Co.
Caleb Shields, Inter-Tribal Board Policy Chairman
Norman Hollow, Fort Peck Assiniboine Sioux Chairman
Sidney D. Morris, A & S Tribal Industry
John Windy Boy, Chairman, Chippewa Cree Nation
Dr. Joseph T. McDonald, President, Salish & Kootenai College
Windy Shoulderblade, Chairman, Executive Committee, Northern Cheyenne Nation
Donald Stewart, Chairman, Crow Nation
Ted Hogan, Secretary, Crow Nation
John Washakie, Shoshone Business Council
Dennis Sun Rhodes, Councilman, Arapahoe Business Council
Alton Harrison, Director, Economic Development Division, Shoshone Arapahoe Business Council
Suzanne Trusler, Morning Star Enterprise
Earl Old Person, Chairman, Blackfeet Tribe
Stan Juneau, Blackfeet Indian Writing Company
Toby Black, Black Lumber Co.
Carroll Horn, Horn Creek Chemical and Mud
Jim Altenhofen, President, American Indian Agricultural Credit Consortium
Beverly Bad Horse, Native American Satellite Network
David Small, President, Native American Satellite Network
John Crane, Technical Director, Native American Satellite Network
John Burke, Shell Mining Company
Bill Houghland, Shell Oil Company
Evert Makinen, Raven Exploration Company
Tom Acevedo, Tribal Attorney
Pat Stands, Member, Management Committee, Raven Oil
Tom Assay, Rosebud and Treasure Counties and Northern Cheyenne Reservation

Total Witnesses --28

SAN DIEGO, CALIFORNIA February 6, 1984

Witnesses

Joseph Wilson, President, Wil-Jo, Inc.
Martha Wetmore, Chemehuevi Indian Nation
Pam Arviso, Southern California Tribal Chairmen's Association
Dennis Turner, Senior Planner, Southern California Tribal Chairmen's Association
Bob Rodriguez, Chairman, All Mission Housing Authority
Julie Benedict, Commissioner, All Mission Housing Authority
Bo Mazzetti, Proprietor, Rincon Reservation
Eric Natwig, President, First American Capital
King Freeman, Chairman, Pala Band of Mission Indians
Patricia Dixon, Chairperson, Pauma Band of Mission Indians
Steve Esquibel, Tribal Administrator, San Pasqual Band of Mission Indians
Ron Peralta, Chairman, San Pasqual Band of Mission Indians
Art Bunce, Tribal Attorney, Barona Band of Mission Indians
Peter McDonald, Director of Sales, Cataract, Inc.
Leo Calac, Owner, The Indian Shop
Mitzie Magante, Chairman, La Jolla Band of Mission Indians
Charles McGowan, San Diego Division Manager, Conrock Company
Sunny Velasquez, Morongo Indian Reservation
Raymond Basquez, Pechanga Indian Reservation
Charles Scott, Attorney, Director of California Indian Legal Services

Total Witnesses -- 20

ALBUQUERQUE, NEW MEXICO February 16, 1984

Witnesses

Alex Mercure, Secretary of Commerce & Economic Development, Office of Governor Anaya
Michael Fairbanks, President, New Mexico Indian Business Association
Merle Garcia, Governor, Acoma Pueblo
John Olguin, Member, Isleta Pueblo Council
Delfin Lovato, Chairman, All Indian Pueblo Council
Ramon Garcia, Governor, Santo Domingo Pueblo
Betty Walker, Superintendent, Southern Pueblos Agency
Carlos Vigil, Governor, Nambe Pueblo; Chairman, Eight Northern Indian Tribes Pueblo Council
Lloyd New, Chairman, Indian Arts and Crafts Board
Governor Pedro, Sr., Laguna Pueblo
George Wicker, Executive Director, All Indian Pueblo Cultural Center
Rob Burpo, Dean Witter Reynolds
Noel Behne, First National Bank of Albuquerque
Donald Tanner, Little Bear Enterprises, Inc.
Donald Bradley, Bradley Construction, Inc.
Roger Tsabetsaye, Zuni Nation
Dave Warren, Director of the Cultural Studies Center, Institute of American Indian Arts
Martha Hill, Past President, Indian Arts and Crafts Association

(continued)

ALBUQUERQUE, NEW MEXICO -- continued

Witnesses

Senator John Pinto, New Mexico State Senate
Kathryn Harris Tijerina, Director, Indian Resource Development

Total Witnesses -- 20

ST. PAUL, MINNESOTA February 23, 1984

Witnesses

Gordon Thayer, Chairman, Lac Courte Oreilles Nation
Rick Baker, Council Member, Lac Courte Oreilles Nation
Don St. Clair, Owner, Don's Television
Will Antell, Manager of Special Programs for Minnesota Department of Education
Reuben Snake, Chairman, Winnebago Nation
Purcell Powless, Chairman, Oneida Nation
Don Kettler, Rural Ventures, Inc.
Jim Thannum, Planner, Bad River Nation
Apesanahkwat, Chairman, Menominee Nation
Joseph Reed, Tribal Planner, Menominee Nation
Evan Burr, Corporate Commissioner, Mille Lacs Reservation
Norman Crooks, Chairman, Shakopee Mewakanton Community
Herb Dorr, President, OHHE Associated
Roger Jourdain, Chairman, Red Lake Band of Chippewas
Wilham Riendl, Consultant, Fond du Lac Manufacturers
Burt Wolf, Lac Courte Oreilles, Private Sector
Jose Cruz, Director of Hispanic Concerns, Minnesota Hispanic Chamber of Commerce

Total Witnesses -- 17

RAPID CITY, SOUTH DAKOTA March 1, 1984

Witnesses

Arthur Lacroix, Mayor of Rapid City
Julie Lichter, Representing Senator James Abdnor
Dr. Arthur Zimiga, Economic Development Specialist, Rapid City Indian Service Council
Richard J. La Fromboise, Chairman, Turtle Mountain Chippewa Nation
John Steele, Vice Chairman, Oglala Sioux Nation
Mrs. Emma Tibbets, President, Winona Club, Sioux Indian Cultural Center
Eva Nichols, President, WICA Leadership Council
Paul Winston, President, Winston International
William Junor, Executive Vice-President, Winston International
James Edwards, Vice-President for Operation, Winston International
Dr. Lionel Bordeaux, President, Sinte Gleska College
Ed Danks, President, Eagle Nest Construction
Stanford Adelstein, Agricultural Developer, Businessman
Russell Hawkins, Chairman, Sisseton-Wahpeton Sioux Nation

(continued)

RAPID CITY, SOUTH DAKOTA -- continued

Witnesses

Tom Loomis, Director, Wambli Archery Company
Roger Bordeaux, Association of Contract Tribal Schools
Lou Dillon, Association of Contract Tribal Schools
Jim Stone, Association of Contract Tribal Schools
Carl Waln, Cattleman
Leonard Hare, Jr., Cattleman, Yankton Sioux Nation
Webster Two Hawk, Chairman, Rosebud Sioux Nation
Harley Good Bear, President, Fort Berthold Community College
Nicholas Chapman, District Manager, Armco Building Systems
John Fredericks, Jr., President, Fort Berthold Land and Livestock Association
Louis Twiss, President, Oglala Sioux Livestock and Landowners Association
Morgan Garreau, Chairman, Cheyenne River Sioux Nation
Harold Condon, Cheyenne River Sioux Nation
Eagle Hunter, Cheyenne River Sioux Nation
Tom Iron, Standing Rock Sioux Nation
Earl Silk, Standing Rock Sioux Nation
Bob Buffalo Boy, Standing Rock Sioux Nation
Karen Means, Executive Director, Rapid City Indian Service Council
Patrick Spears, Chairman, Lower Brule Sioux Nation
Mario Gonzales, Attorney, Lower Brule Sioux Nation
Pete Shelton, Owner, Native American Office Supplies
Colleen Cut Schall, Lakota Jewelry Visions
Mitchell Zephier, Lakota Jewelry Visions
John Lytle, First American Alliance
Chuck Jacobs, First Nations Financial Project

Total Witnesses -- 39

RENO, NEVADA March 5, 1984

Witnesses

Sheri Frazier, Business, Smoke Shop
Shane Del Cohen, Reno-Sparks Indian Development Investment Circle
Millie Sunday, Ottwater Engineers, Inc.
Dr. Ronald Ott, Ottwater Engineers, Inc.
Dr. John Humphrey, Ottwater Engineers, Inc.
Mark Radcliffe, Attorney, Brobeck, Phelger & Harrison
Bob Posner, Director, Center for Indian Economic Development
Jerry Millett, Chairman, Shoshone Duckwater Tribal Council
Sherry Smith, Shoshone Duckwater Tribal Council
Roy Garcia, Chairman, Pyramid Lake
Arthur Lewis, Economic Development Specialist, Chairman, Covelo Nation
La Nada, Tribal Survival Economies System
Alvin James, Tribal Survival Economies System
Paul Gary Beck, Karwk Tribal Council
John Reardon, Director, Commission on Economic Development for State of Nevada
Linda Howard, Chairperson, Yerington Paiute Tribal Council

(continued)

RENO, NEVADA -- continued

Witnesses

Dale Risling, Hoopa Valley Business Council
Robert Frank, Chairman, Washoe Tribal Council
Alvin Moyle, Chairman, Fallon Paiute Shoshone Business Council
Wayne Johnson, Business Manager, Walker River Paiute
Richard Rossback, Owner, Anish-in-ab-a, Satellite Communications
Stephanie Wasile Mumm, American Indian International Development Corporation

Total Witnesses -- 22

WASHINGTON, D.C. March 15, 1984

Witnesses

Larry Burgess, Chairman, Chitimacha Tribal Council
Alan Parker, President, American Indian National Bank
Pat Gerard, American Indian National Bank
Jonathan Taylor, Chairman, Eastern Band of Cherokees
Helen Sheirbeck, Regional Director, American Indian Nations Save the Children Federation
William "Buffalo" Tiger, Chairman, Miccosukee Nation
Lee Tiger, Miccosukee Nation
John Stevens, Governor, Indian Township Passamaquoddy Reservation
Karl Nicholas, Passamaquoddy Reservation
Leonard Garrow, Chief, St. Regis Mohawk Nation
Lawrence Pyke, St. Regis Mohawk Nation
Joe DeLaCruz, President, National Congress of American Indians
Walter K. Babcock, First Councilman, Narraganssett Nation
Louis R. Bruce, President, Native American Consultants, Inc.
Michael Edmonds, Director, Employment and Training Director for the Boston Indian Council
Rex Evans, Director, United South and Eastern Tribes
John Meyers, Sella & Meyers & Associates
LaDonna Harris, President, Americans for Indian Opportunity
Elmer Savilla, Executive Director, National Tribal Chairmen's Association
Lincoln White, Executive Director, National Advisory Council on Indian Education

Total Witnesses -- 20

PAGE, ARIZONA April 9, 1984

Witnesses

Paul D. Barber, Lawyer, Rodey, Dickason, Sloan, Akin & Robb
Travis Parashonts, Parashonts Construction
Francisco Jose, Vice Chairman, Papago Nation
Stewart Pike, Committee Member, Ute Business Committee
Tully Lameman, Executive Director, Utah Navajo Development Council
John Knight, Vice President, Telum Oil Company
Lynn Lee, Director, College of Eastern Utah
Geneal Anderson, Acting Chairman, Paiute Nation

(continued)

PAGE, ARIZONA -- continued

Witnesses

Arthur Monson, Paiute Nation
Mary Ellen Sloan, Lawyer, Paiute Nation
Dr. Raymond Farnsworth, American Indian Services
Bruce Parry, Director, Utah Division of Indian Affairs
George Abe, Natural Resources Manager, Bureau of Indian Affairs
Sam Little, Retired Administator
Dr. Dennis Little, Public Health Service
Herb Frazier, Principal, Mexican Hat Elementary School
David Leavitt, Program Advisor, Special Programs Indian Vocation
Charley A. DeJolie, Chairman, DeJolie Enterprises
Tully Haswood, Chairman, Chapter Development Committee, LeChee Chapter of the Navajo Nation
Harry Sloan, Chapter President, Navajo Nation
Robert Roessel, Salt River Project
Louise Yellowman, Coconino County Board of Supervisors
Joe Dayzie, Council Delegate of Red Lake, Chapter #4, Tonalea

Total Witnesses -- 22

WINDOW ROCK, ARIZONA April 10, 1984

Witnesses

Peterson Zah, Chairman, Navajo Nation
Roman Bitsuie, Chairman, Economic Development
Ed Richards, General Manager, Navajo Forest Products Industry
Malcolm Dalton, General Manager, Tribal Utility Authority
Art Allison, Agricultural Products Industry
Andy Wilson, President, Concerned Indian Business Persons
Henry Whipple, Manager, Ft. Defiance Housing Corporation
Allan S. Begay, President, Dineh Cooperatives
Leslie J. Nelson, Photographer, Nizhoni Photography
William H. Govette, Vice-President, General Dynamics Pamona Division, Fabrication/Assembly
Michael T. Allison, Division of Economic Development, Navajo
Michael Nelson, Navajo Westerner
Milt Harshe, Executive Vice-President, New Mexico Association Tobacco & Candy Distributors
William Krumm, President, Krumm Distributing Company
Dr. Lawrence Isaac, Jr., President, Navajo Business Association
Bella Rogers McCabe, Big Five Company
Edward McCabe, Big Five Company
David John, Big Five Company
David Lester, Executive Director, Council of Energy Resource Tribes
Dean Jackson, President, Navajo Community College
Leonard Arviso, President, Sacred Mountain Supply Company
J. Tonney Bowman, Attorney, Navajo Tribal Courts
David J. Tsosie, Chairman, Navajo Nation Education Committee

Total Witnesses -- 23

SPOKANE, WASHINGTON April 26, 1984

Witnesses

David J. Matheson, Chairman, Coeur d'Alene Nation
Allen Pinkham, Chairman, Nez Perce Nation
Conrad Edwards, Executive Director, Tribal Employment Rights Organization
Joseph Felsman, Chairman, Confederated Salish & Kootenai Tribes
Fred Houle, Executive Treasurer
Ron Trosper, Financial Analyst of Confederated Salish & Kootenai Tribes
Pat Quincy, Tribal Manager, Squaxin Island
Ron Allen, Tribal Chairman, Jamestown
Larry Lewis, Planner
David Whitner, Chairman, Squaxin Island
Eric Durbin, Quileute
Walter Jackson, Quileute
Fred Lane, Vice Chairman, Lummi Nation
Dixie Cooper, Vice Chairman, Kootenai Nation of Idaho
Allen Pinkham, Chairman, Columbia River Intertribal Commission
Tim Wapato, Executive Director
John Platt, Policy Assistant
Pat Morrell, Loan Program Director, Columbia River Intertribal Commission
Lena Landry, Treasurer
Arvado Toutstops, Tribal Planner
John Platt, Council Member, Puyallup Nation
Stan Jones, Sr., Chairman, Tulalip Tribe, Inc.
Del Moss, Planner, Tulalip Tribe, Inc.
Ben Mulder, Vice President & Manager, Lynden National Bank
Douglas Taylor, General Manager, Chehalis Indian Tribal Enterprise (C.I.T.E)
Kenneth Brown, President, Chehalis Indian Tribal Enterprise (C.I.T.E.)
Eddie Palmanteer, Jr., Fiscal Resources Department Director
Charles Yeahauo, President, Native American Business Alliance;
Charles de Montigny, Vice Chairman, American Indian Council of Architects & Engineers
Lee Jacobsen, East Slope Taxpayers Association
Bill Big Springs, Sr., Glacier County Commissioner, Montana
Lonnie James, Confederated Tribes
Bernie Whitebear, Executive Director, United Indians of All Tribes Foundation
Skip Scannon, United Indians of All Tribes Foundation

Total Witnesses -- 34

ANCHORAGE, ALASKA May 10, 1984

Witnesses

Daniel Alex, President, Eklutna, Inc.
Dorothy Cook, Vice President, Eklutna, Inc.
Ted Burton, Attorney, Eklutna, Inc.
Edward Claplanhoo, Vice Chairman, Makah Nation
Allen L. William, President, Sealaska Business Investment Corporation

(continued)

ANCHORAGE, ALASKA -- continued

Witnesses

Mary Lou Lindahl, Manager, Alaska Native Arts and Crafts
Ralph A. Johnson, President, Salamat of Native Association, Inc.
Andrew Hope, President, Sitka Community Association
Nelson Frank, Board Member, Sheetika
James Patlan, Pomo Nation
Caleb Pungowiyi, President, Kawerak, Inc.
Charles Edwardson, Jr., Owner, CircumPolar Group
Norm Nault, Executive Director, Kenaitze Indian Tribe
Jean Flanagan, Executive Director, Institute of Alaska Native Arts
Rose Atuk Fosdick, Services Director, Institute of Alaska Native Arts
Atuk Fosdick, Services Director, Institute of Alaska Native Arts
Richard E. See, Businesss Analyst, Fairbanks Native Association, Economic Development Program
Anthony R. Tilma, Financial Analyst, Fairbanks Native Association, Economic Development Program
Bartz Englishoe, Land Manager, Bethel Native Corporation
Evelyn Hash Pete, Shareholder, Ahtna, Inc.
Janie Leask, President, Alaska Federation of Natives
Donna Murphy, Eklutna, Inc.
Rosita Worl, Social Anthropologist, Chilkat Institute, Alaska Native News

Total Witnesses -- 23

SAN FRANCISCO, CALIFORNIA May 14, 1984
Private Sector

Witnessess

Don Walsh, Vice-President, Community Development Department, Bank of North America, San Francisco, CA
Tom Ratcliffe, Boettcher and Company
Don Arnold, Boettcher and Company
Vien Ilano, Fifth Avenue
Jeanette Henry, Indian Historian Press
Rupert Costa, Indian Historian Press
Claude Neely, Regional Land Man, Amoco Production Company
Lyman F. Pierce, Executive Director, Los Angeles Indian Center, Inc.
Stephen Stallings, President of the United Indian Development Association (UIDA)
Eric Natwig, President, First American Capital
Ben Mudler, Vice-President, Ranier Bank
Linda Massey, Land Manager for Exploration, Atlantic Richfield Company
John Atkins, Vice-President, Utah International, Inc.
Ira Englander, President of Englander Productions, Los Angeles, CA
Walter Holmes, Natural Resource Consultant
Judith Kammins Albietz, Albietz and Consultants

Total Witnesses -- 16

SAN FRANCISCO, CALIFORNIA May 15, 1984
State & Local Government

Witnesses

Randy Scott, NW Project Manager, Commission on State Tribal Relations
Dr. Edd Brown, Office of the Governor, State of Arizona
Mahlon Swentkofske, County Commissioner, Cass County, Minnesota
Dennis Drayney, Duchenesne City Attorney, Duchenesne County, Utah
Neal Domgard, Unitah City Commissioner, Unitah County, Utah
Bruce King, Economic Developer, Oneida Nation
Michael Clements, Second Vice Chairman, Confederated Tribes of Warm Springs
Doug McClelland, Fiscal Services Manager, Confederated Tribes of Warm Springs
Paul Beck, Chairman, Karuk Nation
Dale Risling, Councilman, Hoopa Nation
J.M. Williams, Senator, Idaho State Senate
Mark Powless, Chairman, National Coucil Task Force on Gaming on Indian Reservations
Mike Clingman, Senior Administrative Assistant, Office of the Governor, State of Oklahoma
Odie Nance, Chairman, Oklahoma Tax Commission
Lee Jacobsen, Secretary, East Slope Taxpayer's Association, MT
Vernon T. Johnson, Executive Director, California Council of Tribal Governments

Total Witnesses -- 16

OVERVIEW OF THE
PRIVATE SECTOR OPPORTUNITIES
AND
CONSTRAINTS STUDY

PRIVATE SECTOR SURVEY OF OPPORTUNITIES AND CONSTRAINTS

Overview

The Commission asked the Rensselaerville Institute in Rensselaerville, New York to organize and carry out business opportunities and constraints studies on several reservations from a private sector business perspective. The Institute obtained the services of highly qualified experts and practitioners: venture capitalists, financial analysts, business developers, businessmen, and specialists with other entrepreneurial backgrounds. All had first hand experience with both small and large business firms. Some had experience with business development among minority and other disadvantaged groups and regions, although not necessarily in Indian country.

On-site visits were made to four reservations and two tribal areas during the period from May to August 1984. Specific opportunities and constraints were identified and analyzed based on actual and current conditions. Some of the problems noted, as well as many of the opportunities, are site-specific, inherent to the people involved and the setting and the modes of operation. However, the locations visited represented a broad sample of reservations, ranging from large to small in both population and area, in various geographic locations throughout the United States, with various types of resource based economies and with various types of businesses under way or planned.

One or more members of the team visited each of the sites. In some cases pre-visits were made to collect data. In all instances, specific focus opportunities were identified in advance. However, during each visit specific efforts were made to discover new opportunities. After the site visits, follow-up was carried out in a number of ways, including additional visits by team members, by specific consultation site visits or exchanges of information with operational experts in specific businesses, by review of financial and other plans, etc.

Data sources included direct observation of on-going businesses, a variety of meetings with business leaders, tribal officials, customers, and tribal staff supporting economic development, and comprehensive analysis of plans and documents for specific businesses. The emphasis was empirical. The teams sought to observe the realities present on-site which were actually blocking opportunities and causing constraints.

The teams made a deliberate effort *not* to be guided by the literature of economic development problems on Indian reservations, or by constantly repeated legal and institutional themes. They also made a conscious decision to go beyond the sometimes conventional wisdom of many "experts" on Indian business development, who may be more experienced on advising tribal organizations on how to get grant funds than they are at starting viable businesses.

Information from this analytical track of the Commission's work generated data from a different perspective--private business expertise-- as compared to the Commission's other data sources providing information from the public hearing process, the literature review, the governmental perspective, etc. A theme which repeatedly appeared in the testimony given in the hearing process, in the literature, and expressed in the views of many government officials, was that one of the major problems for Indian reservation economic development was the difficult and limited access to capital. In actuality, however, what the experienced businessmen found was that easier access to capital, by itself, would do little to mitigate many of the problems and obstacles holding back business development on Indian reservations.

While legal and institutional issues may not be directly blocking many business opportunities, in a broader sense the private sector experts felt that they were clearly implicated. They felt that most if not all of the problems impeding the opportunities they examined could be traced to two institutional images: one involving the federal government and Indian reservations, and the other involving Indian tribes and Indian businesses. They concluded that successful businesses on Indian reservations would not be brought about by "fine tuning" present programs and solutions, by making a few more grants, and by creating easier access to capital. They felt that some major steps are needed to dramatically redefine the relationships between the federal government and the Indian reservations on the one hand, and between the Indian tribes and Indian businesses on the other.

Fundamental differences between businesses and public service agencies were also identified. The following chart illustrates some of these basic differences:

Public Service Agencies	Businesses
Budget based	Sales based
Build businesses	Reduce costs, increase sales
Satisfy funders	Make and keep customers
Indirect relationship between funding & performance	Direct relationship between funding & performance
Organizations compete	Products compete
Generally convey value of product	Generally add value to produce
Rewarded for organizational visibility	Rewarded for product visibility
Diffuse focus	Narrow focus

Major Constraints Identified

On the reservations visited, the private sector teams identified seven major constraints which they found confronting the opportunities which tribal leadership and individual Indians wished to pursue. Since these constraints were so pervasive on all the sites visited, a reasonable assumption is that they occur widely on Indian reservations throughout the United States.

In a descending order of importance, the seven identified constraints were as follows:

1. An Insufficient Number of Entrepreneurs and Chief Executive Officers

There is no substitute for a competent entrepreneur whether it is a new business start, the turn-around of a failing business, or merely the application of sound business principles to the running of successful enterprises.

In looking at both new and existing businesses, the teams found that the lack of a qualified business leader -- the in-place person to run the business -- is a very key factor. In some cases they found people in place who were simply not qualified to run that business. In many new ventures, they found job descriptions rather than a person, and often faced the belief by tribal officials and economic or business planners that it was not necessary to have the chief executive officer in place prior to raising the capital for the enterprise.

Part of the problem appeared to be due to the way in which many businesses are selected on Indian reservations. In some cases activities are chosen because they are in vogue for purposes of federal funding, e.g., motels and tourist centers, industrial parks, etc. In others they come from a vision of political leadership or a presumed consumer need. Very seldom, however, does it appear that tribes have started with an entrepreneur who had his or her own interest and allowed or encouraged businesses to be built around that person.

It should be stressed that the teams found a shortage of experienced entrepreneurs and chief executive officers on reservations. However, they did not find a lack of talent or potential for becoming successful entrepreneurs of tribal or individual enterprises.

A problem noted was that not only is entrepreneurial capacity not nurtured, but that it may be undervalued. Some people with whom the teams met defined the lack of entrepreneurs on reservations by their belief that they are an undesirable element. In contrast to the economic development orientation by many governmental people, both tribal and federal, who seek a broad public good, entrepreneurs were characterized as narrow-minded people preoccupied with making money.

Another reason for a shortage of entrepreneurs on many reservations is that they do not find the bureaucratic life congenial. Many will simply not put up with the excessive regulations and delays to get permits and leases, or to accept the review processes by people at the tribal and federal agency level not well-versed in business. Several cases were noted where individuals tried to work within the tribal framework only to leave, often to set up successful businesses off the reservation. It was felt that tribal governments and their economic development staffs may have consistently underestimated the presence, or the potential, of independent Indian businessmen on and near the reservations. There may be more business vitality in the Indian small business community than in the tribal businesses, but they are far less visible.

When Indian entrepreneurs were identified, it was discovered that they had found ways to overcome many of the obstacles cited by government officials, economic planners and consultants. They had managed to get through the bureaucratic regulations and lease land. They had managed to get bank loans. They had managed to offer goods or services with quality, quantities and prices such that they made a profit.

However, these people are busy being successful. They don't take the time to testify before commissions, or to raise their voices in protest. They see life as offering opportunities rather than problems, and they are at work implementing such possiblities to their benefit, and to the benefit of their surrounding communities.

2. Lack of Understanding of Business Principles by a Sufficient Number of Tribal Staff

Most of the people whose responsibilty was to encourage economic development that the teams met, either in tribal or federal government, or serving as consultants to these governmental levels, had never been part of a successful business. Most had come either from an academic or a public service agency background. Most describe themselves as in the world of "economic development", defined as a realm in which studies and plans are undertaken which will lead to increased development. Few come from the world of business enterprise. In some measure, this is because education and "professional" credentials are given more weight than experience in hiring and assigning these people.

The teams found the gaps between economic planning and business development experience to be awesome, and explained why so many businesses are ill-founded. (See the chart in the Overview section for some of the major differences between public service agencies and businesses.) The public service agency was never intended to operate using business principles. It is ill-equipped to manage, evaluate, and counsel private businesses. Different people, with different skills are needed. Time after time, the teams were shown "business plans" which amounted to funding proposals to the federal government. They were long on philosophy and short on strategy, long on budget justification and short on income justification. Business planning was found to be particularly weak in the marketing area. One proposal indicated "The initial objectives of this operation are to create a fad", with no apparent knowledge that most businesses tap markets rather than create them. Another plan stated: "The size of our market is governed by how much we can produce" -- thus dismissing the marketing problem as incidental; whatever they can make, someone will buy. The list of such statements was numerous.

Where market research was included, generally industry standards were used to derive size and share of the market, with no evidence that a given product and pricing structure would lead to direct sales. There was more of a notion of providing social service delivery systems for clients, than of selling a product or service to customers. The teams found little sensitivity to the notion of needing a competitive edge so the customer would voluntarily wish to purchase a product or service. The lack of justification of revenue to the enterprise appears to be the major obstacle to capital. The emphasis on tribal sovereignty and the inability to mortgage resources speaks to the problem of collateral for business loans. The bankers the teams met were far more concerned with the problem of generating enough cash to repay the loan. They had no desire to foreclose on security. They wanted to see business and marketing plans which assures them of an adequate emphasis on sales as the basis of business health.

A second area in which business principles are not followed is cost control. Tribally run businesses seem particularly susceptible to an overdose of capital investment. Using the budget based concepts of government agencies -- e.g., get the costs as high as possible since that is what governs the size of the grant -- a plant and equipment budget is set in place which is far more lavish than the business needs at that point in time. In the private sector, lowering of costs is an effective way to increase revenues. Other areas where cost control was found deficient included accounting, production, and personnel.

Another problem identified was the tendency to focus on "big picture" planning. The result of this is a diffusion of effort. Time and funds are spread very thinly over a number of possibilities that could better be spent by concentrating on a few of the better opportunities.

Another point made by the teams was that in addition to using proven business practices for tribal business enterprises, tribes would also benefit if they applied these principles in managing their internal assets. For example, the tribes visited do not exert pressure to achieve concessions at banks where they are major depositors. Therefore tribal cash assets are an underused resource.

3. Tribal Government Directly Involved in Business

The teams of private sector businessmen felt strongly that tribal politics and business simply don't mix. The structural nature of the public service and business operations are distinct. (See the chart in the Overview section.) Tribal governments are political entities, subject to the natural tendencies of politics. The use and value of patronage, the short-run perspective, and a widely diffused set of constituents and agendas make singular concentration by tribal political leaders on a tribal business enterprise difficult. The issue from the tribal perspective seems to hinge on control. The issue is less over maximizing profitability and more over controlling income allocation. The teams felt that clear distinctions should be made between the protection of rights and the provision of needs. Tribes appropriately pursue political and legal channels to preserve and defend the rights of Indians in areas ranging from civil liberties to resource access and ownership. But beyond establishing certain prerequisites for economic development, these channels have little to offer the development of private sector business. The lack of appropriate distinctions between needs and rights may explain the relatively large roles played by lawyers in making what amounts to business decisions for tribal business enterprises. Empirically, the teams found that while the businesses run by individual Indians were generally smaller than those managed by the tribes, they tended to be more successful. Also, far more often they provide needed goods and services to Indians. It was felt that from an opportunity perspective, they were far better bets for private investment to create new jobs than investment in tribal enterprises.

Some of the solutions which seek to address this difficulty appeared to add to the problem rather than solving it. For example, the creation of buffers between the tribe and the business in the form of independent boards of directors and MESBIC financing tools sometimes create additonal layers of oversight and decision making with which the business must deal.

Joint venturing with the private sector did not always work well either. In such ventures, the tribe often supplies plant and equipment, access to Indian preference markets, relatively low cost labor, and labor-training support. The outside partner often brings the technology and know-how, management and working capital. In many instances the tribe gets the short end of the deal for many of the same reasons that tribal government have difficulty in making their own businesses work -- it does not have the general business or technical knowledge to forge an equitable business agreement. Also, in such ventures, it often gives away control, or management to people and groups who do not share the tribe's objectives.

The issue is not about structure or personality, however. It involves a basic conflict over goals. Many tribes have as a primary economic development objective the use of business as a means to generate cash directly for other tribal purposes. The reality is that new businesses are not a good means to that end. Even the most successful enterprises need to sustain a cash flow for reinvestment for many years to come. Emerging businesses can best produce economic benefits for the tribe indirectly --by paying taxes rather than by turning over profits, providing jobs, building equity, attracting suppliers, meeting needs and generating a better economic atmosphere.

The teams felt that tribes not only were not good at running businesses, but they were also not good at developing them. Many of the technical assistance programs reviewed, for example, were staffed by earnest and caring young people just a few years out of school. Their dedication, however, is no substitute for experience and wisdom. Also, there appeared to be a tendency to hire more people rather than better people. The teams felt that there would be a strong net gain to the tribes and to the business development climate by replacing any four economic development staff paid $15,000 per year, with one experienced business expert paid $60,000 per year.

Another difficulty which compounded the problem of inadequate technical experience and skills of staff people was the tribes difficulty in hiring first-rate consultants who knew about business principles and who were proficient in specific industrial or technical areas. The teams felt that of the many consultant-prepared market studies, business plans and reports, few were competent.

Many people appear to be hired for their ability to tell the client what they want to hear rather than what they need to learn. Others are hired because they are part of an old boy network of Indian consultants. One economic development consultant to one tribe explained that he did not need to know how to write a business plan since his job was to write proposals. Other consultants indicated that their busiest times of the year were less dependent on business cycles and more dependent on federal grant funding cycles.

Another problem encountered with tribally owned and operated enterprises concerns scale. The tribes appear to be more interested in "instant" large-scale businesses. In part, this is because only larger businesses can attract the attention of key programs in the federal funding agencies such as the Economic Development Administration and the Bureau of Indian Affairs. Tribal political leadership seems attracted to highly visible business activity, often involving a substantial physical plant. However, successful businesses often need to start small and be given the time to grow to a large size.

4. The Bureau of Indian Affairs

The apparent reason for the many layers of BIA approval and involvment in business enterprise on reservations is to stop the tribes from doing something foolish. However, the teams felt that the BIA procedures to "safeguard" are not effective. Most projects, whether wise or unwise, that the tribes really want to initiate do eventually get funded. However, they do so at much higher costs given the delays caused by the BIA.

What the BIA actually accomplishes is not minimizing mistakes, but rather causes the mistakes to cost more and at the same time prevents a healthy private sector from taking root. The redundancy and overlap of BIA reviews at the agency, area and central office levels prevents much progress. The grant/loan review process, performed by people who do not know business, stops more progress. If it does not stop viable businesses from being set up on reservations, in many cases it deflects it to a non-reservation area. Enterprises promoted by tribal governments appear to fare better with the BIA than those promoted by individual Indians.

5. Land

Land and land use was sometimes seen as a problem, but is not considered a major obstacle. Many people have successfully and expeditiously gained leases. Some have even managed to convince banks to accept the leasehold as collateral. Tribal control of land can be a problem, but not a insurmountable one.

Different and often competing or unclear philosophies about land tenure and use sometimes make it difficult to select the right land for business development. In larger tribes, decentralized or local perspectives often compete with tribal level philosophies about land use. Lease terms are often unfavorable to business because an enterprise needs sufficient length of term, reasonable payments, and sufficient flexibility to handle changes in plant needs over time. Also, land and natural resources are often the subject of legal actions, which creates a negative business climate.

The question of land is important, also, in a deeper sense. The teams found that in no other area of business development is a needed resource so closely tied to cultural beliefs and values. The teams gained a deep respect for the fact that many Indians cannot and will not treat land as an expendable and transferable resource. The main problem is not with the Indian viewpoint toward land. The main problem is a failure by the businessman to appreciate the power and depth of this feeling, and the need to build business development upon different assumptions concerning this particular resource.

6. Sovereign Immunity

This is another problem which the teams discovered low on the list of priorities. This was seen as a problem in the context of creditor recourse, but not necessarily beyond. As noted above, the teams found the lack of good business plans, a shortage of entrepreneurs, and insufficient attention to cash flows to be of far more importance to banks and other investors than questions of collateral.

Sovereign immunity may emerge as more of a problem in such areas as taxation. Tribes justifiably want to tax corporations and enterprises on reservations, especially if non-Indian in nature. However, if such taxes add to rather than displace existing state or local taxes, this creates a strong disincentive for business. However, as more tribes adopt a version of the Uniform Commerical Code and other standard business practices, and as jurisdictional disputes with state and local taxing authorities are resolved, this problem would become less important.

Indeed, sovereign immunity could be turned around to become an opportunity rather than a problem. Reservations as free-trade zones, or free from Davis-Bacon or union wage requirements, or where tax rates could be negotiated, for example, could have incentive value for locating enterprises there.

7. Location

Reservations can be marginal business sites for some types of enterprises. They are often distant from urban centers which isolates them from access to markets, supplies, technology and know-how, and the preferred residences of many top management prospects, both Indian and non-Indian. However, the private sector teams put this problem low on the list of constraints.

It has an effect on the kind of business rather than on the prospect for business. Industrial park sites, tourism centers, and shopping centers -- three fashionable projects of federal government funding agencies for many years -- were often poor choices for Indian reservations.

On larger reservations, opportunities might exist for some businesses to capture tribal and individual Indian dollars on an import substitution basis. On many reservations, opportunities should be explored for enterprises which might be related to natural or other resources to which the Indians have easy access. Other opportunities should be explored for industries, services or other activities which have less sensitivity to transportation or other locational issues.

VIEWS AND RECOMMENDATIONS MADE BY THE PRIVATE SECTOR TEAM

To overcome some of the major problems and constraints discussed above, the teams made the following illustrative observations and recommendations to the Commission for its consideration.

Relationship Between Indian Tribes and the Federal Government

1. Eliminate all grant and loan programs to Indian tribes which help them to own and operate businesses. Instead, provide funds on a loan and equity investment basis to Indian businesses and local development corporations to do this.

2. Support tribes in the role of defining economic development policy goals and objectives both through limited financial support and by covenants which require businesses receiving governmental loans to contribute directly to the realization of overall objectives.

3. Eliminate all reviews by government employees, at both tribal and federal levels, of loan and grant applications for businesses enterprises. Replace such governmental employee review by private sector experts who are not involved in any network of favoritism and mutual support for projects, and who are guided by business principles and experience.

4. Eliminate the format and content of the proposal in favor of the format and content of the business plan for all requests for support.

5. Eliminate all regulatory aspects by government of reservation economic development that go beyond general regulations of all other private sector businesses and non-profit agencies nurturing economic development.

6. Reduce the federal government's trustee responsibility for investing and protecting Indian resources and funds to a protection but not a management role. Indian tribes should by given the right, authority and responsibility to control their own resources and funds.

7. Reduce or eliminate the proximity to reservations of the federal government, and especially the Bureau of Indian Affairs, through closing of field offices on or near reservations which regulate or support businesses.

8. Encourage tribal governments to define their role in business development to be more in the areas of economic development target setting, and in the areas of setting priorities and incentives for action by business firms, than in the direct management of such business firms.

SOME CONCEPTS FOR TECHNICAL AND FINANCIAL ASSISTANCE TO INDIAN BUSINESSES

1. Seek a combination of funding from the federal and private sector (foundations, non-profit institutions, investment funds and individual corporations) for an Indian Business Development Center(s). The Center(s) would offer both investment funds and expert advice. In most cases, a client would not get one without the other. It would serve Indian-owned and/or operated businesses on or near reservations and also Indian tribes.

2. There might be one Center serving Indian businesses nationwide, or perhaps two regional Centers. The Center(s) would initiate services to a reservation through a relationship with elected tribal leaderships. This could be codified by a memorandum of understanding between the Center and the tribal chairman or council. It would set forth mutual responsibilities and commitments. The Center, for example, could commit to undertake a business audit of the tribal enterprises on a given reservation, and to identify business opportunities and constraints, and lay out the targets which tribal leadership seeks for economic development.

3. The economic development objectives and targets of the tribes could be used in two ways. One, as a guide to select which businesses to help, and two, to use covenants or other mechanisms to ensure that the selected businesses include behaviors, actions and outcomes, consistent with sound business principles, that respond to the reservation's objectives as a requirement for getting help from the Center(s).

The kinds of factors which could be considered for individual business targets in order to conform to tribal economic development goals might include the following:

a. Jobs created (number of jobs, capital cost per job created, skills training provided, etc.);

b. Revenues and benefits generated (tax base or other structure for tribal revenues, presence of otherwise unavailable goods and services, lower prices for and/or higher quality of goods and services, etc.);

c. Performance (return on investment, net profit, etc.);

d. Capital formation (retained earnings, assets created, balance sheet, etc.);

e. Community development relationship (percent of Indian ownership, cultural acceptance, etc.);

f. Economic multipliers (multiplier effects of payroll and local purchases, increasing value of land, etc.);

4. The Center(s) would not provide any funds or technical assistance for general economic planning. However, it might include operating support for the following types of expert assistance programs:

a. Expert assistance to on-going businesses;

b. Programs to nurture entrepreneurs, including entrepreneurial development programs for adults and junior achievement and other programs to nurture younger people;

c. Expert assistance on business starts, including help for individuals who wish to start a business on a small scale, help for businesses which wish to begin on a larger basis, search and specification of the entrepreneur, and referral to the Center's investment fund for partial capital support, when justified;

d. Expert assistance in partnership development, to provide help for tribes considering partnerships with outside corporations, to assist the tribe in striking more reasonable and equitable contracts and joint ventures;

e. A special program on marketing and sales, including workshop and other training efforts for individuals who will staff the businesses in the sales area, and assistance in sales leads in a given industry, both in such preferential areas as "Buy Indian" contracting, as well as in the general marketplace.

5. The Center(s) would have a loan and equity position fund which would provide for several different types of capital assistance or "windows" to which businesses could come. These could include the following:

a. Concessionary loan funds, which might provide loan funds on a concessionary basis, as justified, perhaps down to as low as one or two percent interest, and/or a small administrative fee;

b. Conventional loans, which would be equivalent to a bank loan, with perhaps slightly longer terms, which would be set at about the prime rate, and adjusted to its rise and fall;

c. Equity positions, wherein the Center might actually buy ownership in the stock of the company. These might range from conventional venture capital type deals with a healthy set of covenants which could actually involve the Center in managing the business if its performances slipped below specified minimums to more relaxed or even concessionary investments which simply provide "patient capital" to a business which needs and deserves it. In all equity instances, a provision would be in place for the business to buy out the Center's equity with specified procedures for computing current value.

6. The Center(s) should be staffed by a small number of highly qualified people well versed in the full range of sound business practices, including accounting and finance, and marketing and sales. The expert consultant group who would be drawn upon to provide advice and assistance to individual enterprises should be the "right person" type of expert with deep and practical business and management experience in the functional area of the individual business enterprise assisted.

They could include individuals whose time was donated by a corporation and those who would be reimbursed on an hourly charge rate basis. They could include individuals similar to those recently retired business executives in the International Executive Service Corps who help individual businesses abroad improve their operations, and in SCORE who provide similar services to firms assisted by the Small Business Administration.

There should not be any "Indian Preference" for the business experts hired by or used by the Center(s). The teams felt strongly that no credit whatsoever should be given for past economic development consulting with tribes. They suggested the prime criteria for selection should be past direct experience in operating successful businesses and/or in helping others to do so outside of a context of government subvention.

7. The teams also suggested consideration be given to the creation of a series of locally based community development corporations (CDCs) to work directly with tribes, and other local governments, institutions and businesses and the suggested national or regional Indian Business Development Center(s). Such a locally based CDC could serve as a development agent whose primary goal would be the development of a particular geographic area. The CDC would be able to collaborate with various public and private parties without being controlled by political or profit goals. Without being part of a governmental structure, it would be able to attract the kind and amount of public resources which may be necessary to an area in chronic distress, whose survival would depend on the quality of its decisions, and successful performance, and which would be able to maintain its effort over the long run, perhaps over 20 - 50 years. The Ford Foundation and other national and international organizations have had success with this type of approach.

A CDC which was governed by residents of a reservation, and had a good working arrangement with the tribal government would apppear to offer a possible compromise between the need for independence from tribal government control on the one hand and the worries about exploitation and preservation of culture that are at the root of some of the desires for control on the other.

With a shortage of enterprises or entrepreneurs ready to start or expand businesses, the local based CDC could assist at the initial stages in various advocacy, brokering, information gathering, research, financing or other strategies that might be needed to capitalize on opportunities for business development.

The CDC could also have a role in the nurturing of very small businesses. The Center(s) concept would be useful in working with large and/or sophisticated ventures or opportunities. However, the cost of working with and nurturing very small initiatives would be prohibitive.

Experience elsewhere indicates that how the CDC's are funded would be an important issue. The teams suggested that the funding sources should not be controlled by politicians. The funding source must be able to make a long term commitment to a CDC and must base its support on a level of independence from both the tribal government and the Bureau of Indian Affairs. Continued support should depend on the accomplishments of the CDC and funding should contribute so the asset base of the CDC can be slowly developed through its competent management of resources and projects.

TRIBAL WATER RIGHTS ISSUES:
PROSPECT FOR
ECONOMIC DEVELOPMENT

TRIBAL WATER RIGHTS ISSUES : PROSPECT FOR ECONOMIC DEVELOPMENT

TRIBAL WATER TRUST CORPORATION

Tribal Government Water Authority	Tribal Water Trust Corporation
• Oversees and establishes overall tribal water policy • Sets guidelines for water quality control • Sets priorities for water use control • Sets zoning requirements for water development	• Tribal members as corporate shareholders • Board of Trustees to manage the trust asset according to tribal government policies • Implements policies thru Water Quality Control Board and Water Use Control Board

Tribal Government Water Authority

The first step following quantification of tribal water rights is to establish a tribal water authority to provide administrative oversight for water use and control. A complete inventory of the tribe's water assets and a determination of their quality use availability needs to be completed. The federal government, specifically the U.S. Fish and Wildlife Service, the U.S. Geological Survey, the Bureau of Reclamation, the Army Corps of Engineers and the Bureau of Indian Affairs, should provide extensive technical assistance to any and all Indian tribes requiring such assistance.

Upon completion of the inventory the tribe's water requirements need to be identified and quantified. Sewage, sanitation, domestic uses and other municipal uses need to be considered. After all municipal necessities are met then the water authority should set standards for water use and control for the excess water supplies.

There are essentially four distinct classifications for water use: instream, agricultural, waste disposal and amenity uses. Instream uses, such as navigation and the generation of hydroelectric power, do not significantly affect water quality and their development is usually determined by other factors such as environmental concerns. Agricultural uses within the same watershed usually contribute to ground water and other return flows so their effect on water quantity and quality is minimal. Amenity uses include swimming, fishing, boating, industrial processing and aesthetics and do not significantly alter water quality. Waste disposal uses are in direct competition with amenity and agricultural uses because an improvement in water quality would add to the value of agricultural and amenity waters, whereas waste disposers would be harmed since improvement could occur only if less waste were discharged into the water.

The tribal government is obliged to decide how these uses will divide the resource and then how to enforce its decisions. Restrictions on water use must be arbitrary and enforcement must be stringent. Determining priority of use is addressed, at least theoretically, by the economic principle that the value of the harm inflicted should be directly proportional to the value of the quality gained. However, this principle works only if the values are comparable. Unfortunately, amenity uses do not have values that can be accurately measured, so when measuring the "gain" in amenity-use values it is impossible to compare it to a corresponding "loss" in waste disposal-use values. Since economic theory cannot be easily applied, political decisions based on social pressures determine the resource use. For example, once there is a social demand for "pollution control", political entities institute anti-pollution restrictions incrementally until social pressures about their cost outweigh pressures about pollution. Ultimately, what is unique about the ownership of water is that the government must decide, without the benefit of economics, how the asset is to be divided among different uses.

Once quantification of excess water supplies and priority of use has been determined the water authority must determine the percentage or specific amount of excess water that can be used for each priority use. For example, the authority may decide that 50% of the available water should go for agricultural uses or that 2,000 acre-feet of water should be for agriculture. The availability of water, the constance of the water flow, and the importance of the priority use should be considered in this decision. The authority must also decide how much waste may be disposed into the water system. A standard unit for measuring waste must be adopted and it must take into consideration the various types of wastes and their effects on other uses. Next, the authority must decide where certain uses should take place by designating specific zones or regions for water use. For example, the water authority may decide that 10 equivalent tons, or standard units, of waste per year are to be dumped into the reservation river system. The authority also decides that the waste disposal sites are to be located in a region in the lower reaches of the river system, downstream from all amenity and agricultural uses.

The most important enforcement activity the tribal water authority will confront is in the area of water quality control and the best method to accomplish its objectives is a charging system. Under this system the water authority would levy fines against waste dischargers for exceeding government levels. Waste dischargers should be monitored collectively and not individually in order to keep administrative costs at a minimum. The monitoring could take place at the furthest downstream point from the last discharger and any violation of the authority's quotas would result in every discharger sharing the costs of the fine.

Initially, a certain amount of experimentation would be necessary to determine the level of charge required to attain the acceptable level of waste discharge. The level of charge should exceed the costs to the dischargers for reducing their wastes. If the waste dischargers simply pass on the fines to the consumer, then the fine can be set at such a prohibitive rate that consumptive patterns would change to less expensive products. The charging system of enforcement is clearly the most cost-effective and efficient means of implementing government standards and provides the incentive both to reduce waste and to improve the technology of treating waste before it is discharged.

The tribal government water authority is responsible for setting broad guidelines for water quality and quantity control and for ensuring that the public good is secure and protected. Ultimately, tribal water rights should be protected by the federal trust responsibility and not be sold or forfeited without approval of the Secretary of the Interior; however administration of this trust asset should be the responsibility of each tribal government in the excercise of tribal self-determination.

Tribal Water Trust Corporation

The Corporation would be a tribally-held business enterprise with each tribal member representing a shareholder. The Corporation's principle objective is to market the tribe's excess water supplies for the greatest economic return within the guidelines established by the tribal water authority. Each shareholder would receive dividends from all or part of the profits depending on distribution plans determined by the Corporation's Board of Trustees.

The trustees should be elected by the shareholders in staggered terms of ten years each. There should be no provisions for re-election and recall could be accomplished only through 2/3 majority vote of the shareholders. Before electing trustees the shareholders should allow a profit pay incentive for the trustees to ensure the maintenance of a business environment with as little political interference as possible.

The Board of Trustees would conduct corporate business through two subordinate boards - the Water Quality Control Board and the Water Use Control Board. Each of these boards would be semi-autonomous but the Board of Trustees would retain plenary authority and responsibility for the Corporation's actions.

The Water Quality Control Board would consist of one-half of the membership of the Board of Trustees and would primarily be responsible for administering water quality control standards established by the tribal water authority. One means of implementing water quality standards is to issue "pollution permits" and sell them on the open market. If the water authority should establish that no more than 10 equivalent tons of waste should be discharged into a water system per year for the next five years, then the Corporation can issue an equivalent amount of permits and require that a permit be obtained before waste could be discharged. The WQCB would then auction the pollution permits to the highest bidder on an annual basis according to the water authority's pre-set quotas.

The marketplace would exert economic pressures on the bidding process, and among permit owners once the auction has concluded. The market would be constant because firms that found they had excess rights would be in the sellers market, while firms in need of pollution rights would be in the market to buy. Anyone could buy permits. Agricultural and amenity users could buy permits and simply refuse to use them, which would increase the value of their water. The great virtue of this marketplace is that the price is set by the competition between buyers and sellers of permits. Essential to the existence of an efficient market is the inflexible resolve of the tribal water authority not to alter the allowable level of pollution within the decided time frame, regardless of the political pressures to increase the level.

It is important to note that the pollution rights market is not a "true" economic market because it is not affected by the forces of supply and demand. The tribal water authority arbitrarily determines the pollution quota, but when pollution permit prices rise it does not mean that the water has become more valuable, it means that the water use has become more valuable. The value of water is directly proportional to its degree of quality. A market increase in the value of water will necessarily result in the development of water-use efficient technology.

The Water Quality Control Board should be responsible for conducting the auction and serve as broker between buyers and sellers. The Board should be responsible for maintaining a tracking system for all pollution permits and should advertise any pending transactions so any potential damaged parties could become aware. The Board should establish a trust fund from the auction proceedings and should be responsible for the financial management of the fund. Similarly, it might be prudent for the Board to bid for its own permits so it may sell them on the open market when the price may be more lucrative.

The Water Use Control Board would consist of the other half of the membership of the Board of Trustees and would primarily be responsible for administering water use control priorities established by the tribal water authority. Like the Water Quality Control Board, the Water Use Control Board would issue an equivalent number of permits for each acre-foot of excess water supply and auction those permits to the highest bidder according to the priorities set by the water authority. For example, if the water authority decided that 2,000 acre-feet of water shall be excludec only for use by agricultural users, then only agricultural users would be allowed to bid on those permits. On the open market those agricultural use permits could only be traded among agricultural users to ensure conformity with government policies.

It is likely, though, that these permits could be traded freely without specific concern for priority of use. This is possible because waste disposal uses could be zoned away from waters to be used for amenity and agricultural purposes. By removing the waste factor the flexibility of use for the remaining water permits is at its maximum level. At this point water can be utilized interchangably and title to permits can be easily transferred as climate, demographic, and economic conditions change. In the short run, rainfall and temperature conditions can be unpredictable so optimum flexibility is necessary to meet the economic pressures of supply and demand. In the longer run, as population patterns change and economic development occurs water delivery should be easily available to any redistribution plan adopted by the water authority. As stated before, any tribal plan in water use should be established for a specific time, after which it would be subject to changes and modifications to meet existing conditions. Stability and consistency in water authority policies is necessary for the maintenance of an efficient water market. As the economic marketplace is controlled by expectation and speculation, security of tenure in the use of the commodity once given must be maintained.

The Water Use Control Board should have the same administrative functions pertaining to serving as a broker, advertising transactions, maintaining a tracking system, and managing the trust fund as the Water Quality Control Board.

PREPARED STATEMENT OF LOUIS F. CLAIBORNE, DEPUTY SOLICITOR GENERAL (1978-85)

My name is Louis Claiborne. I am presently Of Counsel to the San Francisco law firm of Washburn, Briscoe & McCarthy. I also have chambers in London as a common law barrister. Thus far, no Indian case has crossed the Atlantic. But, before this most recent phase, I was, for many years, the federal government's primary advocate in Indian cases before the Supreme Court. I orally argued some 20 Indian cases in the Supreme Court. And, over the years, I wrote or rewrote several dozen briefs in Indian cases.

I did all this in the name of the United States, as a member of the Solicitor General's Office, to which I first came as an Assistant in mid-1962. From 1964 to mid-1970, I was a Deputy Solicitor General; I returned on a temporary basis each summer between 1973 and 1977; in 1978 I returned as a full-time Deputy and so remained until the end of 1985. As the Committee knows, the role of the Solicitor General is to handle the federal government's Supreme Court litigation and to screen appeals to other appellate courts, federal and state, when the Government has lost in the trial court. During my time in the Solicitor General's office, I have been in charge of almost every category of cases involving public law except taxation and antitrust law--criminal cases, civil rights cases, claims against the United States, land cases, environmental cases, labor cases, cases involving all the regulatory agencies, and cases on the Original Docket of the Supreme Court. The one constant was Indian matters. At all times since 1964, Indian cases were a part of my "jurisdiction." In principle, these Indian cases were only a small part of my area of responsibility, and so it was at first in practice. But, at the end, as I shall explain in a moment, a disproportionate amount of time and effort had to be devoted to Indian cases if they were to be presented as they deserved to be.

With this background, I can perhaps help the Committee on the question of legal representation of Indian claims by federal attorneys. I appreciate that this is only one of the many areas under investigation. But I suggest it is an important one--even if my perspective is somewhat warped by long involvement: I could hardly see as unimportant a task to which I have given so much of my waning energies.

I.

I am before you because I am concerned that all is not well on this score. The worst may be over with the departure of certain key lawyers at Interior and Justice. But, as I shall detail in a moment, I believe the problem is inherent in the current process and calls for remedies beyond mere changes of personnel. One way of stating the problem is that, under the prevailing system, too much depends on officials who have only incidental responsibility for Indian matters. As things are, these officials are not selected for their commitment to the vindication of Indian rights and, chances are, will have no such commitment. In the best of climates, it will be only by accident that the Secretary of Interior, the Deputy Secretary, the Solicitor of the Department of the Interior, or the Deputy Solicitor, the Assistant Attorney General in charge of the Land and Natural Resources Division or his deputies, or the Solicitor General, his relevant Deputy, or Assistants, will have any knowledge of or sympathy for Indian rights. And in an Administration like that just ended, it is predictable that none of these officials will be committed to the Indian cause. When that is the situation, Indian interests are not represented in the courts by the federal government, or are only partly or half-heartedly represented, or, even, are opposed by the Government.

One may well ask whether this much matters, especially when, as is more usual today, the Indian Tribes have their own lawyers anyway. Let me suggest why there is cause for concern:

First, litigation is vital to the vindication of Indian rights. This is so because of the minority status and political impotence of the Indian population, and the persisting indifference, even hostility, to Indian claims. I need hardly tell the Members of this Subcommittee that Indian rights are not always conceded by state and local authorities, or even the state courts, in much of the West. Nor was the attitude more acquiescent in the East or the South when Tribes asserted substantial land claims, as the Passemoquoddy and Penobscot did in Maine, the Mohegans in Connecticut, the Mashpee in Massachusetts, the Oneidas in New York, and the Catawba in South Carolina. The intervention of the courts--especially the federal courts and the Supreme Court on review of state decisions--remains essential to establishing and enforcing tribal rights.

Second, the federal involvement in such litigation is often critical. In many cases, even today, a small Tribe does not have its own lawyers and, indeed, is sometimes unaware of all its rights. But, in any event, it is impossible for any Tribe, through its own lawyers, to match the advantages of federal legal representation. At their best, the Interior and Justice lawyers have the benefit of accumulated expertise, unique resources, and a generous purse. Unlike private lawyers who must sometimes put forward grossly inflated claims at the insistence of their client, government lawyers are much freer to present a "winnable" argument. They also enjoy special insulation when pursuing an unpopular claim and their participation in the name of the United States gives added weight to the argument. And, in the most controversial cases, the courts are emboldened to vindicate the Indian claim by the assurance that the federal government will enforce the judgment. Occasionally, as in the Washington Fishery Case, the local opposition is so strong that federal force is required to carry out the decision--just as it was in the desegregation context.

Finally, such federal involvement in Indian litigation is entirely appropriate. This is partly on the same principle that federal lawyers took up the vindication of black civil rights. But here, there are additional reasons.

The fact is that, even today, the United States enjoys unusually pervasive powers over Indian tribes and, correspondingly, owes them a special duty of protection. This is a consequence of historical events in which the United States played the leading, if not always noble, role; it is reflected in the Constitution, in treaties and agreements between the United States and the several tribes; and it is the recurring theme of Congressional legislation (with some lapses) for two centuries. The obligation of "trust" or "guardianship," as it has been called, is not an anachronism. As all who have studied the matter know, the Tribes still need federal protection--especially in vindicating their rightful claim to exercise governmental powers over non-Indians within their territory and to enjoy exemption from state regulation and taxation. Besides, the usual adversary is the State, an ill-matched opponent for most Tribes unless supported by the federal government.

This duty of legal representation does not mean that government lawyers are required to assert any claim an Indian Tribe advances. They would lose their special credibility with the courts--and disserve the Tribe--if they did that. Besides, government lawyers advocating Indian rights remain attorneys for the United States: they are not tribal lawyers. On the other hand, there is an obligation to put forward every reasonably arguable claim, even if, as judge, one would reject it. Considerations of economy and administrative convenience cannot play a part. Nor can conflicting governmental interests be permitted to affect the decision whether to initiate litigation to vindicate Indian rights, or defend a suit, or appeal an unfavorable judgment, or support the Tribe's case through intervention or amicus filings. Nor is it proper to compromise the Indian interest--by reducing the claim or "watering down" the arguments--so as to accommodate other federal "clients." Indeed, this is one of the most serious defaults since it may pass undetected and, according to Supreme Court decisions, only quite recently re-affirmed, is beyond correction if only discovered after a final judgment has been entered.

The conflict problem is, of course, what led President Nixon to propose the establishment of an independent "Indian trust counsel," and, for a time, spawned the divided brief practice. The Supreme Court has stressed that the multiple, and sometimes conflicting, clientele of government lawyers is a consequence of Congressional decisions to assign Indian affairs to an Interior Department with many other competing responsibilities and all government litigation to a single Department of Justice. Which is to say: "the ball is back in your court." Various remedies have been suggested and no doubt will be advanced in these hearings. I shall very tentatively propose one or two ideas myself in a moment. What I want to stress immediately, however, is my view that the conflict problem is not satisfactorily solved by saying to the Tribe: "We can't represent you, but here are the funds to hire yourself another lawyer."

In 1966 Congress opened the federal courts to Tribes suing in their own and name and existing provisions of law permit paying tribal lawyers. But, while important, this is no adequate substitute for representation, or support, by government lawyers. Self-representation, without a "second" from the United States robs the Tribe of the advantages of federal participation which I have just recited--and, indeed, suggests to the court that, in the government's view, the tribal claim is frivolous. Here I should note the long established government practice of supporting claims filed by Indian lawyers through amicus curiae briefs. I daresay the most important developments in Indian law in the last decade have been shaped by such briefs. (This is a commercial break). In many cases, moreover, the United States and the Tribe are both actual parties, the Tribe having intervened in a case brought by the government. But this is no ground for the United States to drop out. It will be a rare case when the Tribe's lawyers are so good and the case is so obviously winnable that government participation is truly superfluous.

II.

Under the prevailing arrangements, it is not difficult to see the many ways in which the Indian interests may suffer. One possibility is that the tribal claim may go unasserted because it never reaches the lawyers at all, having been administratively buried. This apparently happened in respect of the reserved water right of the Pyramid Lake Tribe of Nevada for their fishery. When the United States was seeking an adjudication of water rights in the Truckee River--which feeds Pyramid Lake--for the first federal project under the Reclamation Act of 1902, the Newlands Project, a small amount of water was claimed for irrigation of the Indian Reservation, but nothing to maintain the fishery, although fishing was the livelihood of those Indians. Why did this default occur?

As is usually true, even in 1922, when the federal water claim was being considered, there was a governmental official who urged the right course. But his was a lone voice and he was overruled. According to some of the evidence, apparently accepted by the Supreme Court some five years ago when the whole question was sought (unsuccessfully) to be re-opened, it was the Acting Commissioner of Indian Affairs himself who decided not to pursue the claim for fishery water. He was of the old school that believed Indians should be "civilized" by being turned into farmers and weaned away from dependence on hunting an fishing. One would not encounter quite that attitude today, but there are still some very "paternalistic" officials within the Interior and Justice Departments who feel they know best what is good for the Indian and, to some extent at least, shape the claim asserted on behalf of the Tribe accordingly.

A more serious continuing problem is the situation I have already mentioned in which the United States has conflicting clients. That was true in the litigation affecting Pyramid Lake. From the first, it was recognized that if all the water sought for irrigation by the farmers of the Newlands Project was diverted, the Indian fishery would suffer. And so it was decided to prefer "the larger interests involved in . . . the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." That view is not confined to the 1920's. It was echoed in 1981 in a letter from Senator Laxalt of Nevada to the Attorney General urging against the appeal I was recommending in a related case, partly in the interest of the Pyramid Lake Tribe. The Senator was asking that preference be given to the interest of "all those ranchers--

who are ours." (I am glad to say that the then Solicitor General, Rex Lee, stood firm and appealed). And, even more recently, I am told the Solicitor of the Department of the Interior articulated the proposition that the United States has a trust obligation to the people of the Western states that overrides its duty to the Indian Tribes--this in arguing against filing an amicus brief supporting a mineral lessee paying tribal severance taxes who was claiming exemption from duplicative State severance taxes. (In this instance, it appears, the Solicitor General did not stand tall).

Even more common, however, is the official who makes decisions affecting Indian interests but who, though not hostile, is unsympathetic. The cause may be simply ignorance of Indian law and of the special obligation owed to the Tribes. There is, for instance, a recurring tendency to treat a recommendation by the Indian Service as no more entitled to preference than one advanced by the Reclamation Service or the Park Service or the Bureau of Land Management. Nor is this "equal treatment" approach confined to the Interior Department. The same attitude pervades the Land and Natural Resources Division of the Department of Justice. And, no wonder, when Indians are labelled a "natural resource," on a par with land and minerals and trees. This, of course, ignores the very special obligation due to the Indian Tribes as distinct human and political communities. And officials who indulge in such indifferent considerations of Indian rights are disregarding federal policy, as authentically declared by Congress.

Often enough, ignorance of the law accounts for this wrong-headed attitude. But, sometimes, a step beyond innocence, the official--perhaps especially if a lawyer--will be resistant to the idea that Indians should enjoy what is, after all, a very remarkable legal status. Many officials without experience of Indian affairs are tempted to invoke Justice Bradley's dictum about the black man: that he should "cease to be the special favorite of the laws and take the rank of a mere citizen." Needless to say, Bradley was very premature in 1883 and so are his disciples today in respect of the American Indian. But that is often not appreciated. Nor is it a matter of political allegiance, although it is doubtless true that the championing of Indian rights by federal lawyers is least likely in a very conservative climate.

In my experience, Indian advocates are made, not to the manner born. It takes education to accept the unique status of Indians and Indian Tribes. And time: frequent, intensive exposure, over a fairly long span. In the nature of things, one cannot expect understanding of Indian law and commitment to Indian rights from officials who deal only very occasionally with Indian matters and remain in office only a relatively short time. That embraces the Attorney General, the Secretary of Interior, the Solicitor General, and, to a lesser degree, the Assistant Attorney General in charge of the Land and Natural Resources Division and the Solicitor at Interior, and even their Deputies. In practice, these officials tend either to defer somewhat blindly to the few Indian law "experts" in their respective Departments, or to overrule them almost automatically. I have lived through both extremes.

There have been times when the Interior Department would endorse almost any Indian claim, however frivolous under settled law, and when the Lands Division of the Department of Justice was not sufficiently screening Interior's requests to initiate or support lawsuits on behalf of Tribes. More recently, I have experienced the opposite problem: the Interior Department forwarding no recommendation for vindicating the Indian claim, the Lands Division reluctant to act in the absence of such a request, and a Solicitor General concerned that his role was not to initiate governmental filings which no agency was urging. In my last years as Deputy Solicitor General, I therefore found myself expending disproportionate energy persuading the Solicitor General to ignore the silence of others, soliciting advice "under the table" from the suppressed Indian advocates at Interior and Justice, preparing Supreme Court amicus briefs on my own, and fighting all manner of sniping before they were eventually filed. This is not how the system is supposed to work. Unsurprisingly, I have noticed, since my leaving, that the Solicitor General has not filed in what seem to me critical Indian cases in the Supreme Court.

III.

What is to be done? I am far from sure what remedies might succeed. Very tentatively, however, I suggest one possible solution is to establish two or three high-level positions within the government for officials whose sole responsibility is the vindication of Indian rights. I am inclined to resist the creation of a wholly separate Department of Indian Affairs. But I would advocate the establishment of more prominent, more visible, and more independent Indian rights divisions within both the Interior and Justice Departments.

One possible arrangement within the Interior Department is to give the Indian Division (a perhaps usefully renamed Bureau of Indian Affairs) an autonomous status subject only to the Secretary's presumably very occasional intervention, and to assign to that agency a lawyer wholly independent of the Interior Solicitor ("Indian Trust Counsel"?) who would be free to send his recommendations to the Justice Department without supervision or screening. So, also, within the Department of Justice, I suggest it might be appropriate to create a new Division of Indian Affairs with its own Assistant Attorney General, who would submit his views directly to the Attorney General and to the Solicitor General.

The object of the exercise, as I have mentioned, is to create high-level offices dedicated solely to the vindication of Indian rights, which must be filled by knowledgeable persons committed to the Indian interest. Of course, no re-organization of the government works unless the right people are chosen. But, at least, the modest restructuring I have suggested would expose nominees to confirmation hearings in which their special understanding and commitment to the Indian can be assessed.

I would add one further point, rightly prominent among the reforms urged by Indian Tribes and their lawyers. In my view, there is no circumstance in which federal officials properly may "compromise away" Indian rights in favor of competing federal interests. But even if my suggestion of separate Indian affairs divisions and separate federal lawyers were enacted, there will be cases in which a Secretary of the Interior, an Attorney General, or a Solicitor General, will determine that the Indian claim is without merit and will instruct the federal lawyer not to represent the tribal interest, or even to advocate another, conflicting, claim. In such circumstances, it is right that full and timely disclosure be made to the Tribe, that it be permitted to pursue the case in its own name, and that funds for legal representation be provided. I am not sure that this requires new legislation, but one way or another, the principle should be more firmly established.

PREPARED STATEMENT OF REID PEYTON CHAMBERS, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS (1973-76)

Mr. Chairman and members of the Committee, my name is Reid Peyton Chambers, and I am a partner in the law firm of Sonosky, Chambers & Sachse, Suite 1000, 1250 Eye Street, N.W., Washington, D.C. 20005. I served as Associate Solicitor for Indian Affairs at the Interior Department between 1973 and 1976. In 1976, I left federal service to establish my law firm with Marvin J. Sonosky, then a long-time single practioner in the Indian field, and Harry R. Sachse, at the time Assistant to the Solicitor General in the Justice Department.

Our firm represents principally Indian tribes and tribal organizations, so I have also observed the Executive Branch's handling of Indian policy as a private attorney for over twelve years since my Government service. I am pleased and honored to appear before this Committee to discuss the manner in which the United States has enforced its trust responsibility to protect Indian legal rights in the past two decades.

1. Introduction: the trust responsibility and conflict of interest.

In my view, attorneys with federal agencies who are responsible for Indian matters should function as advocates for Indian rights within those agencies. I think this is not simply a moral imperative or a desirable public policy.

Rather, I submit that it flows from the trust responsibility of the United States toward American Indians.

This trust responsibility is a legal obligation, binding on the United States. In general, the courts have held that, in its administration of Indian property, the United States should be judged at least by the standard and principles of law as would be applied to an ordinary fiduciary in its dealing with Indian property. This has been held to include a duty of care, 1/ a duty to make property productive, 2/ and a duty of loyalty. 3/

Of course, these duties have unfortunately not always been honored. A conflict of interest often arises between Indian rights to resources such as land, water, timber, minerals and rights to hunt and fish, and the claims and demands of other federal agencies - national parks, fish and wildlife refuges, the public lands, public dams and water projects, and the like. This kind of conflict compromises the trust responsibility when Indians are on one side of a controversy in a manner that does not occur in normal public

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1/ Menominee Tribe v. United States, 101 Ct. Cl. 10, 19-20 (1944).

2/ Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

3/ Navajo Tribe v. United States, 364 F.2d 320, 322-24 (Ct. Cl. 1966).

policy decisions. This is because where conflicts of interest between Indian rights and other public projects are presented, special obligations of trust should influence and control the decisions of the Executive Branch.

Let me illustrate: If the United States decides to build a dam which may injure fish resources, or to take public lands within a national park or protected wildlife refuge, that is of course a straight public policy decision. Private interests of various kinds will support or oppose the policy, but ultimately the Government as a policymaker must make the decision. But when Indian rights are involved, the United States is a trustee for invaluable Indian property interests. When the United States subordinates Indian rights to conflicting public policy responsibilities, a breach of trust occurs, at least where there is a reasonable and legitimate support for the Indian position. This is because a trustee should as part of its duty of loyalty subordinate its own interests to those of the trust beneficiary.

When the United States rules against Indian rights in this kind of situation, it is guilty of a conflict of interest. It is true that the Supreme Court ruled in the Pyramid Lake case [4/] that the Executive may sometimes have

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[4/] Nevada v. United States, 463 U.S. 110 (1983).

the power to override a reasonable and legitimate Indian position - if, for example, Congress has specifically authorized the Executive to "wear two hats," and act in favor of the non-Indian project. However, this kind of action is morally odious, usually subjects the United States to legal liability to compensate Indians, and ought to be avoided by a reasonable policymaker.

I think the best way to ameliorate this problem is to establish institutional advocates within the Executive Branch for the Indian position. That was the role I was charged with during my years as Associate Solicitor at the Interior Department. I think it should be the institutional duty of the Associate Solicitor for Indian Affairs, irrespective of who is Secretary and Solicitor, and the role of other Government lawyers as well who deal exclusively or primarily in Indian matters.

I do not believe this role has been followed in the past few years within the federal agencies. Let me demonstrate this conclusion by first summarizing the Government's activities to enforce its trust responsibility in the mid-1970s when I was Associate Solicitor - activities which, I should add, basically continued in both Republican and Democratic Administrations on into the early 1980s. This I think demonstrates that legal enforcement of the Government's trust responsibility to Indians transcends any issue of partisan politics and has, until very recent years, been a cornerstone of the policy of both Republican and Democratic Administrations, going back really to the last years of the Johnson Administration. Then I shall contrast this record with federal performance in the last few years.

2. Institutional advocacy of the trust responsibility:

A. Litigation in the 1970s.

I have supplied the Committee with the Annual Reports of the Solicitor's Office Division of Indian Affairs during my tenture, prepared in 1974, 1975 and 1976. The reports show a dramatic increase in the number of lawsuits that were filed by the United States as trustee for Indian interests against states and private parties. In those three years, we more than doubled the cases brought by the Government protecting Indian rights. Things became so active that the Department of Justice set up a separate Indian litigating section simply to prosecute these cases.

In most cases before the federal courts, at least at the appellate and Supreme Court levels, the Government also filed friend of the court briefs on behalf of Indian interests. In those years, this was mostly due to the work of Harry Sachse, who was then an Assistant to the

Solicitor General. Both before the mid-1970s and afterward, this was mostly because of Louis Claiborne's efforts. [5]

There was for example a dramatic increase in the number of cases filed by the United States to protect Indian hunting and fishing rights. The case filed to protect off-reservation fishing rights in the State of Washington [6] was brought before I joined the Department, and successfully prosecuted while I was there, despite heavy opposition from the Fish and Wildlife Service and political interests in the State.We brought similar cases in Minnesota and Michigan. [7] The Government also filed cases to protect Crow hunting and fishing rights in Montana and to protect the fishing rights of various tribes in Wisconsin. These were "hot" political cases. Governors, Congressmen - sometimes even Senators - on occasion telephoned or met with the Secretary of the Interior and other Department officials to remonstrate about these cases. The cases nonetheless were prosecuted and were invariably successful in protecting the treaty hunting and/or fishing rights involved.

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[5] For example, during the October 1975 Term of the Supreme Court, the Solicitor General filed a "friend of the court" brief in two important cases where it successfully persuaded the Court to limit the scope of jurisdiction conferred on states over Indians under "Public Law 280." The case decided by the Court was Bryan v. Itasca County, 426 U.S. 373 (1975), which held that this Act, although it allowed courts in "Public Law 280" states to adjudicate cases involving Indians on reservations, did not allow states to regulate Indian activities. We also filed a friend of the court brief in Fisher v. District Court, 424 U.S. 383 (1976), and persuaded the Court summarily to reverse a decision by the Montana Supreme Court and hold that the State had no jurisdiction over an adoption proceeding involving Indian residents of the Northern Cheyenne Reservation. Despite the Government's advocacy, however, the Supreme Court that Term rejected the Government's position favoring exclusive federal court jurisdiction over Indian water rights, in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

During the 1974 Term, the United States filed "friend of the court" briefs in Antoine v. Washington, 420 U.S. 194 (1975), which upheld Colville tribal hunting and fishing rights over lands ceded by the Tribes, and in DeCoteau v. District County Court, 420 U.S. 425 (1975), where we unsuccessfully urged the Supreme Court to construe an act of Congress as continuing the Lake Traverse Indian Reservation in South Dakota.

During the 1973 Supreme Court Term, the Government filed a "friend of the court" brief in Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), urging that the State of Washington lacked power to prohibit Indian net fishing on off-Reservation treaty fishing sites. And the Government supported the Oneida Indian Nation's petition for a writ of certiorari and federal court jurisdiction in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

We also greatly increased the number of cases filed by the United States to protect Indian water rights. Many of the cases we brought more than a decade ago are still ongoing, and now form the major workload of the special Indian litigating section Justice established in 1975 - since relatively few new cases have been referred to it by Interior in the past several years.

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[6] United States v. Washington, 520 F.2d 676 (9th Cir. 1976).

[7] E.g., United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), aff'd, 653 F.2d 277 (6th Cir. 1981).

We were not as uniformly successful in the water cases as in hunting and fishing. For example, the Government had been for decades throttling Pyramid Lake in Nevada, virtually drying it up with a federal reclamation project supplying non-Indian users. This was a vicious and longstanding conflict of interest. In the early 1970s, Government policy was entirely reversed, and the Government finally brought suit on behalf of the Pyramid Lake Paiute Tribe against those non-Indian water users. The Department of the Interior began to limit water use by the project, and defended suits against it by the non-Indian irrigators. There are many chapters to this ongoing Pyramid Lake saga, and there have been some losses in the cases, but there have been victories, too; I know the Committee staff is studying the handling of these cases in depth.

The Government also began vigorously to prosecute the Pueblo water rights cases on the Rio Grande during my term as Associate Solicitor, and this case, too, is still ongoing. The Government brought the Papago groundwater case in Arizona, which was successfully settled by legislation. It filed cases in Colorado and in Montana arguing that federal courts rather than state courts are the appropriate forum for Indian water rights. This position was rejected by the Supreme Court in 1976, and again in 1983, so most Indian water rights cases are now adjudicated in state court. We reopened _Arizona v. California_ on the Colorado

River in the Supreme Court, and that controversy, too, is still ongoing. We supported Indian water rights in a number of hearings before the Federal Power Commission (now the Federal Energy Regulatory Commission) as against federally licensed hydroelectric projects.

These water cases, some of which were started even before my tenure began in 1973, were often also strongly resisted by political interests within those states and in many cases by the state congressional delegations and political leaders. Sometimes, of course, the position we took in these cases conflicted with other federal projects such as reclamation projects or fish and wildlife resources. But the determination was made by the Executive Branch to present these cases in the courts and to prosecute them resolutely throughout the 1970s.

The same is true of land cases. One case we brought despite the Government's conflict of interest was the Government support for a claim by the Walker River Tribe in Nevada against Southern Pacific Railroad, urging that Southern Pacific's right-of-way was invalid even though it had been approved by a Secretary of the Interior and even though the railroad line was used by the Navy Department to supply munitions. The United States also resolved land claims of the Salt River and Colorado River Tribes against the Bureau of

Land Management, and then brought suit against various permittees of the Bureau to quiet the Tribes' title.

B. Split briefs.

Another way we dealt with the conflict of interest was by filing "split briefs." This was done pursuant to a written agreement between the Attorney General and the White House, by which the Justice Department agreed to advise any court of a legal position in favor of Indian rights developed by the Solicitor of the Interior Department if the Solicitor believed those rights were infringed by a position being taken by Justice before the court.

I believe the first split brief was filed in Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), before I became Associate Solicitor. The Internal Revenue Service sought to tax income received by an Indian from cattle and farming operations on his allotments. The Government filed the separate views of the Solicitor of the Interior Department that the income was not taxable, and the court agreed with the Solicitor's pro-Indian position.

After I joined the Solicitor's office, the Government filed a split brief in United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), where the Internal Revenue Service was criminally prosecuting an Indian for failing to report income earned from operation of a motel and restaurant on tribal lands assigned to her. The court reversed her criminal conviction for tax evasion for nonpayment of these taxes in Critzer, on the basis of the Solicitor's view in the split brief that the tax was not owing.

We also successfully filed split briefs in two cases where the United States Army Corps of Engineers was seeking to condemn Indian lands without explicit authority from Congress. In both cases, the court held that the Indian lands could not be condemned. [8]

A final "split brief" case involved a controversy between the Tribe and some of its allottees over ownership to minerals on the Northern Cheyenne Reservation. The Ninth Circuit had ruled in favor of the allottees and the Tribe petitioned the Supreme Court to review the case. The Justice Department did not file a brief in the Supreme Court on the merits because it had represented an allottee in the district courts against the tribal claim to ownership of the mineral interest. But in its memorandum to the Court on the petition for certiorari, the Department filed a separate statement by the Solicitor of the Interior Department supporting the Tribe's ownership. This was a particularly important issue, because the Department had earlier administratively granted the Tribe's petition to arrest corrosive strip mining on that Reservation, and we feared that individual allottees might leasse to the coal companies and upset that decision if they were determined to own individual mineral interests. This position was ultimately adopted by the United States Supreme Court. [9]

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[8] United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976); Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Ore. 1977).

In each of these cases where a split brief was filed, then, the Indian interest asserted by the Solicitor was vindicated in court. To me, this demonstrates the high value of unblemished Indian advocacy within the federal agencies. When a federal agency dealing with Indian matters has an office of institutional Indian advocates, that office's position usually prevails. (I illustrate this in Part 2.C. below.) The same is usually true when a reasonable and well-articulated Indian viewpoint is presented to Congress or the courts. Without this kind of vigorous institutional advocacy, Indian interests most often languish or are buried in an agency. This happens, I think, because of the relatively small size of Indian populations; even in smaller western states, majority non-Indian sentiment is very much stronger numerically.

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[9] Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).

C. Intra-agency controversies.

Within the Department of the Interior, while I was Associate Solicitor and afterward, the BIA and the Indian Division of the Solicitor's Office also did constant battle with other department agencies over department projects that conflicted with Indian rights. We were successful sometimes, and unsuccessful other times. For example, we persuaded Solicitor Frizzell to hold that the Colville and Spokane Tribes in the State of Washington had hunting, fishing and jurisdictional rights within Lake Roosevelt despite opposition by the National Park Service, Fish & Wildlife Service and Bureau of Reclamation. We persuaded Secretary of the Interior Morton that a boundary dispute between the Mohave Tribe in Arizona and the Bureau of Land Management should be resolved in favor of the Tribe. Similarly, lands in California were determined by Undersecretary Whittaker to be owned by the Chemehuevi Tribe rather than by the Fish & Wildlife Service.

There were also some bitter losses. We were, for example, unsuccessful in persuading Solicitor Austin to rule that the Quechan Tribe owned lands in California that were claimed by the Bureau of Land Management, in large part because the water rights to those lands would have interfered with federal reclamation contracts. However, in the Carter Administration, Solicitor Krulitz reversed this decision, and the Tribe is now treated as owning the lands (subject, however, to a suit now pending against the Government by non-Indian water districts). And I felt recurrently unable fully to protect Indian water rights that conflicted with the construction of the Central Arizona and Central Utah Projects by the Bureau of Reclamation. My successors had better luck, at least concerning the Central Arizona Project.

The win-loss record aside, my role was always as the institutional advocate for Indian rights. This, I believe, is essential as a component of the Government's trust responsibility. This role was performed by my successors until the past few years. It has been tellingly absent, however, recently.

3. Failure of performance in recent years.

First, there is a telling absence of new affirmative litigation to protect Indian rights filed in the last few years by the Department of Justice. This is because Interior does not refer such cases to Justice. I know of this change in policy from my personal experience. For example, at a hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations on October 27, 1987, the Solicitor of the Interior Department, Mr. Tarr, was questioned about the lack of affirmative Indian litigation. Solicitor Tarr responded that his Department was not being asked by tribal attorneys and Indian tribes to support their position. This seemed a lame excuse, for I see nothing preventing the Solicitor from exercising initiative and seeking ways to further Indian rights. In any event, in the fall of 1987 I wrote to the Solicitor asking the Department to support the position of the Assiniboine and Sioux Tribes of the Fort Peck Reservation in two cases. One case was a claim on behalf of a tribal member for an easement of necessity to reach a landlocked tract being blocked by a non-Indian, and the second involved defending a tribal tax on utility property within the Reservation. Both cases were then in litigation before the federal District Court for the District of Montana.

It took Mr. Tarr almost a year to respond to my request in the land case, and he turned it down. In the meantime, the Tribes had successfully settled this case. I have still not heard whether the Department will support the Tribes in their tax case, although the tribal right to tax has clearly been vindicated by controlling Supreme Court precedent. [10] In the meantime, the Tribes have prevailed in defending the tax before the federal district court without the Government's support, and this case is now on appeal to the Ninth Circuit.

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[10] E.g., Merrion v. Jicarilla-Apache Tribe, 455 U.S. 130 (1982).

Moreover, the Government has not been filing amicus briefs in Indian cases to support the Indian position in appellate litigation or in the Supreme Court in the past several terms. This is a clear change from the prior practice of nearly two decades. The Government's silence at the Supreme Court level, where its support could always be counted upon in the 1970s and early 1980s, has been particularly harmful to Indian rights.

I cannot say how many other attorneys and tribal leaders have, like myself, sought the Government's assistance in Indian cases in recent years and been turned down or ignored. There is certainly the feeling in the tribal bar that there is no point in asking; indeed, there is even a concern that if the Interior Department learns about a case, it may come out against or otherwise act detrimentally to the tribal position.

There is clearly no institutional advocate within the Interior Department to present the Indian position as there was throughout the 1970s - in three Administrations under Presidents Nixon, Ford and Carter - and also in the last years of the Johnson Administration. In this period, Presidents were personally supportive of Indian interests. They appointed Secretaries of the Interior like Stewart Udall, Rogers Morton, Cecil Andrus and others (as well as lesser Interior policymakers, such as the Solicitors Frizzell, Austin and Krulitz and various Assistant Secretaries), who were usually supportive of Indian rights. Perhaps most importantly, during the Nixon and Ford Administrations there was always at least one high-ranking official within the White House - first Leonard Garment together with Brad Patterson, then Dr. Ted Marrs and finally Bobbie Green Kilberg - who was specifically charged by the President with the responsibility to be an expediter for Indian rights. Indian tribal leaders and their attorneys, and in-house Indian advocates within government, could go to those White House officials and secure effective action. These White House officials played a vital coordinating role respecting actions by federal agencies impacting on the trust responsibility to Indians.

Mr. Chairman, thank you for the opportunity to present this testimony. I would be happy to answer any questions, and to work with you and the Committee on this important issue.

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LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT: ______ EXT. ______

Statement of Fact
By
The Lummi Indian Tribe

Russell Means contacted the Lummi Tribe in late October 1988 to inquire about economic development.

Lummi Economic Development Coordinator, Marc Russell, telephoned Mr. Means on October 31, 1988. Mr. Means indicated that he represented the Polish Fishing Fleet in the North Pacific; that the Polish Fleet was looking for a home port for its vessels (some forty 300 foot trawlers); and, that he (Means) had indicated to the Polish Fleet the possibility of a "free port" -- defined as free from any U.S. Government Control -- at Lummi. Mr. Russell informed Mr. Means that the Tribe did not have a Port facility adequate for the Polish Fleet, but that the tribe was planning for an expanded commercial facility. Means indicated that the Polish Fleet (government) would be interested in assisting in financing such a facility.

Mr. Russell telephoned Mr. Means on November 8, 1988 and explained that Lummi neither had nor planned on having a "free port" but rather had a "foreign trade zone"; a status which involves some commercial benefits, but is far from being free of all U.S. Government requirements. Mr. Means complained about the "free port" issue, asserting that "tribes have no guts." There was further discussion of the potential expanded commercial facility, financing from the Polish fishing fleet, and a possible fishing arrangement with Lummi fishermen.

On November 8, 1988, Mr. Russell telefaxed a letter and the pertinent Lummi background materials relating to the port issue and the fishery to Mr. Detko (Mr. Means' partner).

On November 23, 1988 Mr. Means telephoned Mr. Russell to set up a meeting for December 9, 1988. Mr. Means requested that the Lummi Tribe provide travel costs for Mr. Means and Mr. Detko; the Lummi Tribe declined to provide such costs.

On November 29, 1988 the Lummi Tribe received a telefax of a Amerpol (representing the Polish fishing fleet) letter to Mr. Detko confirming a December 9, 1988 meeting.

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Councilman

On December 7, 1988, the Lummi Tribe received a telefax of a letter from Mr. Detko's representative identifying the individuals who would be meeting; their times of arrival; indicating that they would not require assistance to get to their hotel for the December 9, 1988 meeting, and, an inquiry as to whether a evening meeting on December 8, 1988 might also be appropriate.

On December 9, 1988 Mr. Russell picked up Henry Rozek, Chairman of the Board of of Amerpol International and Gregory Stanislawczyk, Vice-President Ship Agency Service from their hotel and took them to the Lummi reservation. Neither Mr. Means nor his partner Mr. Detkon were present. The polish representatives met with Lummi staff and G.I. James, the Vice-Chairman and General Manager of the Tribe. Although the better part of a day was spent meeting, and touring Lummi facilities, it was determined that the Polish Representatives had no interest in financing and had no financial resources available whatsover, and that their fishery needs -- replacing their declining quota of bottom fish (under the Magnuson Act) conflicted with the Lummi salmon fishery.

All pertinent documents, including those referenced in this statement are attached.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL OFFICE
Community Center Building Belcourt, North Dakota 58316
(701) 477-6451

Chairman DeConcini, Co-Chairman McCain and Senator Daschle:

Thank you very much for inviting me to testify to your Committee. My name is Twila Martin-Kekahbah. I am the Chairperson of the Turtle Mountain Band of Chippewa Indians. Although I have been Chairperson only since June of last year, my experience on and off the reservation provides what may be a unique vantage point from which to comment upon a number of issues affecting the Indian community.

I was trained as an educator and hold an advanced degree in that area from the Pennsylvania State University. I currently serve or have served on several national Indian or other civic organizations. I have also worked as a resident scholar for the Phelps-Stokes Fund and was later named to its Board of Trustees. Immediately prior to becoming Tribal Chairperson, I served as a National Fellow for three years with the Kellogg Foundation.

Before addressing the issues directly, I would like to provide you with some background on my Tribe. The Turtle Mountain Indian Reservation is located in North Dakota and is one of the smallest in the United States, measuring 6 miles North to South by 12 miles East to West. It is probably the most densely populated as well. While we do not have an accurate census count, we estimate the population to be as high as 15,000 Tribal members residing on or adjacent to the reservation. Our total enrollment throughout the United States exceeds 25,000. The reservation area is plagued with chronic unemployment, which averages about 65%. The 1980 per capita income was $3,339, which ranks as one of the lowest in the State of North Dakota. Our population is young with 42% less than 16 years of age and a median age of 19.5 years.

The labor force has diversified employment skills, training and experience. This labor force can accomodate a number of new enterprises which need to be developed. Major employers on the Turtle Mountain Reservation include the Government (Tribal, State and Federal), Bulova Jewel Bearing Plant, Turtle Mountain Manufacturing Corporation, Turtle Mountain Corporation and Uniband.

The biggest concern for the Tribe is the lack of employment opportunities. Particularly with the closing of San Haven, a state owned mental health institution. San Haven, located adjacent to the reservation, employed over 400 people, with 75% being enrolled Tribal members.

To address the high unemployment rate, an effort to enhance certain factors of the economic environment needs to be undertaken to encourage growth. These are:

1) Financial resources allocated for marketing the reservation and its resources.
2) Enterprise Zone Designation needs to be completed.
3) Business Development Assistance, Small Business Administration 8(a) Program, and Buy-Indian Act need to be increasingly used.
4) Infrastructure development is required to enlarge the industrial park, water and sewer extension, road development and multi-purpose buildings constructed.
5) BIA grants and loans need to be increased to fund individual and Tribal enterprises.
6) EDA needs an Indian set aside.
7) Financial institutions need to be developed, and
8) A community foundation is being initiated by the Tribe itself.

THE ISSUES

Now let me turn to the issues which to my understanding have been designated as topics for this investigation. My testimony applies to:

1) Child Abuse
2) Tribal Government
3) Bureau of Indian Affairs
4) Gaming, and
5) Contracting

CHILD ABUSE

In the Turtle Mountain Tribal Court, a large percentage of all juvenile court cases adjudicated involve some claim of physical or sexual abuse. I have discussed this with the Tribal Judges and it is estimated that 50% of the juvenile cases involve such issues. According to the Judges, Tribal Court deals with cases involving incest, sexual abuse and molestion of children by step-parents, older juveniles, and other non-relatives, as well as child abuse in foster homes and other institutions.

The Tribe has also seen an increase in teen-age pregnancies, many times involving girls in their lower teens, from the ages of 13 to 15. It is difficult to determine the true extent of the problem. As a rule, it is generally not talked about and kept pretty much within the family. In many ~~cases,~~ abuse comes to the attention of officials long after the fact. But for the most part, the problems seem to be increasing, or at least there seems to be an increased awareness.

There are, I believe, many reasons for the rise in abuse on Indian lands and elsewhere. The family unit, once a strong source of values and supervision, has to a large extent disintegrated. This disintegration is caused by very high unemployment and lack of resources, along with other contributing factors such as a steady increased use of alcohol and drugs. The breakdown in the traditional family unit has produced a climate in which children are abused. If intervention does not occur, such children will continue to be at risk.

I believe one form of intervention is a strong and independent judiciary which is necessary for proper administration of child protection cases. The Indian Self-Determination Act does not recognize Indian courts as a separate and independent judiciary capable of protecting Indian children. Accordingly, we call upon Congress to amend the "638" regulations to allow for Tribal judiciaries to apply for direct funding. The Turtle Mountain Tribal Court proposes to stand as a "Model Court" for testing the concept for direct funding under "638".

It is difficult to assess the best approach to be used in attacking this issue. I believe the solution lies in a multi-faceted approach. Resources need to be made available for intervention, planning, education of high risk families, and programs designed to strengthen families and establish community values.

Resource allocation for these problems should not be on a competitive basis. If we are going to solve these problems we need the financial resources. For example, the Administration on Aging and the Indian Child Welfare Act are being funded with the same amount of appropriations with additional Tribes applying for these dollars. This leaves the existing programs no alternative but to reduce services which are already inadequate.

Tribes have a need for tribally operated facilities to provide services to abused children, abused elderly and their families. Presently, my Tribe must depend upon outside resources in dealing with these problems. This places our people in non-Tribal environments which, in many cases, creates more problems.

Without boarding school facilities or group homes on the reservation, off-reservtion boarding schools are a necessity for many of our children. We do not have any boarding schools on or near the Turtle Mountain Indian Reservation. We do have access to the BIA operated Wahpeton Indian Boarding School, the Flandreau Indian High School and the Pierre Indian Learning Center in South Dakota. We estimate that more than 90% of the students we send to boarding schools enroll there for social reasons as opposed to educational.

The Tribe's social criteria established on recommendations for enrollment in the boarding schools are that the student: 1) was rejected or neglected, 2) does not receive adequate parental supervision, 3) was imperiled due to family behavioral problems, 4) has behavioral problems too difficult for solution by family or local resources and, 5) has siblings or other close relative enrolled who would be adversely affected by separation.

The majority of students who attend schools fall into one or more of the first four factors. Many of our students (approximately 50%) in grades five through twelve can be labeled as high risk because they come from dysfunctional families. Due to the number of dysfunctional families on the reservation, the Tribe alone can fill to capacity any one of the existing boarding schools.

At Turtle Mountain, we as leaders and educators, and parents as well, see the importance of making a greater effort towards improving the quality of education for our youth. Our schools on the reservtion have been designated as a reservation-wide effective schools pilot project. It is only the reservation in the United States so designated by the BIA. Within three to five years, or sooner, we will see a significant difference in the outcomes of our students academically and socially. This is an example of how federal dollars can be effectively used to resolve problems. We know the problems; we need the resources to eliminate them.

TRIBAL GOVERNMENT

Because there had been allegations on misuse of funds under the former government, I pledged to tighten the control over Tribal and federal funds during my campaign for Chairperson. I think I was able to win the votes of many Tribal members because they too were concerned about this issue and wanted very much to restore honesty and integrity to their government. I think that Tribes can, and many are taking steps to, make sure their governments are honest and more stable.

Having studied many other governments during travels to China, Cuba, Nicaragua, Peru, Surinam, Trinidad, Tobago, as well as Japan; I have found striking similarities between the governments of many of those underdeveloped countries and Indian government. In both cases, the governments are often relying on a limited source of income, but exemplary services are still expected of them from their own people and outside sources. Due to the limits of income, many individual government officials become corrupt to enable their families to survive. Despite general similarities to many Third World governments, each Tribal government has a different cultural heritage, different land bases, different sizes of population and different levels of development. Consequently, each Tribe has different needs and Congress needs to recognize and understand these differences.

A means to strengthen Tribes would be the establisment of a national training institute for Tribal government. This institute should be funded through the American Indian Higher Education Consortium and located at one of the member colleges.

BUREAU OF INDIAN AFFAIRS

I beleive there is a role for the BIA to play. Congress must make clear to the BIA exacty what "trust responsibility" means. Congress has allowed the BIA to gradually erode the concept of trust responsibility. To realign the BIA's relationship with the Tribe's there must be clear direction from Congress along with Tribal consultation.

One area of major concern of the Turtle Mountain Tribe is the BIA's inequitable and manipulative funding of Tribes through the Indian Priority System (IPS). This method of disbursing funds is not only totally inequitable among the Tribes, it is also underfunded. The BIA manipulates the IPS by pulling programs off the system at random to cover the BIA

Central Office's shortfalls or favorite projects without consultation with affected Tribes. In addition, the underfunding creates a "divide and conquer" mentality which is not conducive in promoting Tribal unity.

For example, in FY-1986, the average IPS dollar per person for Turtle Mountain was $320.34 which ranked 10th out of the 12 Aberdeen Area Agencies. The high in the Area was $1,109.43 per person. Our Law Enforcement Department and Tribal Court has the 2nd if not the highest incidents per month in the Aberdeen Area and ranks 12th of the 12 Agencies with $47.40 per person in law enforcement dollars. This compares to $294.50 for the high Agency.

The Turtle Mountain Tribe has consistently added to the roads maintenance budget and this year it was eliminated from IPS without our consent and our allocation was reduced. I am enclosing a chart for your later review which will show the inequities of IPS. The allocation of Bureau funds to Tribes on a national basis needs restructuring and more funding, to allow for allocation on an equitable basis.

Another current example of the BIA's lack of consultation with Tribes, is the plan to reorganize BIA education. Purportedly, some 66 education positions and funds to schools are to be cut. While there have been substantial informal discussions on reorganization within the BIA, our Tribe, nor to the best of our knowledge any other Tribe, has been consulted.

Regarding BIA mismanagement, we have a prime example on our Tribal members land management. The Tribe and its members own approximately 156,000 acres of trust land that is located in North and South Dakota and Montana. Of the 156,000 acres, there are 39,000 acres (both surface and mineral) and 17,000 acres (mineral only) administered by the Fort Belknap Agency of Montana, and 21,000 acres (both surface and mineral) and 4,200 acres (mineral only) administered by the Fort Peck Agency of Montana. These lands are the focus of the Tribe's grave concern.

The Bureau Agencies of these two respective reservations, administers all the surface leasing and mineral leasing on those lands mentioned. During March of 1982, field inspections had begun in the area of the Turtle Mountain Public Domain Allotments under the Fort Belknap, Fort Peck and Northern Cheyenne Agency jurisdictions by John Glenn and Associates from Billings Montana

The investigations revealed the BIA was negligent in the management of these lands and excerpts from the full report are appended for the Committee's information and review. The Committee should be aware the investigations revealed that at a conservative estimate over $200,000 in lease income attributable to the Turtle Mountain Tribe and its members has been lost entirely on these lands. At Northern Cheyenne many tracts of land are currently used for grazing, yet there hasn't been any leases on these lands for over 40 years!

Our Tribe is convinced that the individually owned lands located in Montana are not being administered for the benefit of our Tribal land owners. The BIA does not actively participate in the management of those lands under our jurisdiction, yet this is their obligation.

The Tribal heirs of the Public Domain Allotments have forgone or lost a considerable amount of income due to the lack of supervision and sound management of our lands in Montana. Although there have been numerous investigations completed on the Turtle Mountain Public Domain Allotments in Montana, the Tribe has not received any documentation confirming BIA actions taken as a result of those investigations.

GAMING

The Committee should be aware that Indian bingo is an important source of income on our reservation. The Tribe owns and operates a Bingo Palace which employs 30 members of our Tribe and has become the Tribe's largest source of operating revenue. A Tribal Gaming Commission has been in existence for 2 years to establish regulations and oversee all gaming operations within the jurisdiction of the Tribe. For the last 2½ years we have employed a Tribal Gaming Inspector who monitors the day-to-day activities of gaming operations. We have an accounting system which verifies all income derived from gaming operations. Also, we have adopted a Tribal Gaming Code which includes penalties for violations. Based upon our capability to regulate our own gaming, we are applying for "Self-Regulation" under P.L. 100-497, the Indian Gaming Regulatory Act.

The formation of a national "watch dog" commission and forced compacts undermine our Tribal sovereignty. The formation of this Commission, which incidently is a duplication of our own Tribal Gaming Commission, is only another means of non-Tribal agencies getting a piece of the action. Tribes are required to assist in the funding of this Commission by being assessed a percentage of their gross proceeds of gaming revenue. We do not receive assistance in the funding of our Judicial System to set regulations and enforce law through Highway Users Taxes or Federal Excise Taxes, which we as Indian people also pay, nor do we receive funding for alcohol prevention and treatment programs from the taxes paid through the sales of alcohol and tobacco on our lands.

Within the State of North Dakota, in compliance with P.L. 100-497, the only gaming operations we could host through a compact agreement would be blackjack and pari-mutual betting. The State of North Dakota is also proposing to outlaw pull-tabs. If we are forced with a loss of our main source of revenue, is the Federal Government willing to assist in our plans of economic development and self-determination,or are we approaching economic genocide? The Indian Gaming Regulatory Act is a forced taxation upon Tribes involved in gaming.

CONTRACTING

Despite the economic hardship facing our Tribe, and virtually all others, we are fortunate to have our own Tribally owned Turtle Mountain Manufacturing Corporation (TMMC). This major plant, which manufactures truck boxes and trailers, provides employment to 150 of our Tribal families. Under SBA 8(a) provisions, the Corporation has successfully competed for a number of Department of Defense (DOD) contracts totaling more than $18 million dollars annually. TMMC has also recently competed for and obtained an initial first year piolot contract of $1 million from the Ford Motor Company. Providing we perform successfully during the pilot year, Ford has indicated they will provide TMMC multi-year, multi-million dollar contracts.

Despite these successes, TMMC is approaching the nine year limit under which a company can receive SBA 8(a) status. For new manufacturing businesses starting in one of the most geographically remote and economically depressed areas of the United States, the nine year limit for start-up is unrealistic. For example, TMMC was initially run as a joint venture for 3 years with a non-Indian company. During that entire period we accured losses. It has only been during the past 6 years since TMMC came under exclusive Tribal control that we have begun to see small profits.

We recommend in the case of Tribes, Congress amend the SBA 8(a) status to a longer period, perhaps 12 years. Meanwhile, we recommend SBA be authorized to grant extensions to corporations which are at a particular disadvantage due to newness, extreme poverty, or geographic isolation from markets.

To encourage the continued economic and social development of the reservation, our Tribe is initiating the Turtle Mountain Community Development Foundation this spring. Patterned after city and state community foundations, to the best of our knowledge, this is the first Tribally sponsored community foundation in the United States. We are planning to seed the foundation by investing a portion of our interest off of our recent treaty settlement in the foundation's endowment.

We are challenging the U.S. private sector corporations and foundations to join as partners in raising the foundation's endowment. Patterned after Congress' recently amended legislation to establish a federal matching program for American Indian Tribally Controlled College endowments, we encourage Congress to enact legislation to provide matching fund grants or contracts to Tribally sponsored foundations. Such grants, or contracts deposited in the endowment, can serve as a national model for Tribal, private sector and federal government cooperation.

In addition to TMMC, and smaller Tribally sponsored joint venture companies, like Uniband; we have approximately 100 Indian owned businesses, on and near the reservation. Some of these legitimate Indian small businesses have had great difficulty competing for major contracts let on the reservation because of "Indian front" businesses. These "fronts", usually employing an individual Indian with financial backing from major non-Indian firms, can obtain capital and bonding which our smaller legitimate Indian companies cannot.

While BIA business development grants and loans, SBA 8(a) and Indian preference status are helpful incentives, they are insufficient in competing with these "front" organizations. Besides, depending on how the articles of corporation of these "fronts" are filed, they also qualify for these incentive programs.

We recommend Congress investigate the contracting procedures on the reservations to prevent "front" organizations from unfairly competing with our legitimate Indian businesses. Equally important, we feel means must be developed to assure legitimate Indian businesses more equitable access to capital and bonding.

The Department of Transportations (DOT) Surface Transportation Act provides specific minority contracting goals when DOT funds are released to States for highway construction. This is probably the only federal program that effectively reaches the small Indian business or individual entrepreneurs in North Dakota. We recommend that DOT's program serve as a national model to all federal funds which flow into a State and contribute to enterprise growth and jobs.

Those federal agencies that do have programs to provide incentives to Indians and other minorities, such as SBA, BIA, IHS, as well as many State and city governments, have different criteria to certify the legitimacy of an Indian and/or minority business for contracting purposes. We recommend that Congress enact legislation to establish one federal agency minority certification board. Such legislation might provide cross-certification from one agency to another. A single certifying process would certainly cut down on the bureaucratic "white tape" a small Indian business has to endure to even qualify for minority incentive programs.

Finally, the Congress and the U.S. public should be aware of the very embryotic nature of Indian business. Unlike other racial minorities, there was virtually no history of Indian business development on the reservations until the 1970s. This lack of enterprise experience, coupled with the most severe economic deprivation and, frequently, geographic isolation places Indian business in the worst competitive position of any group in the United States. To overcome these built-in unfair competitive starting positions with other U.S. businesses, the few federal incentive programs that exist need to be increasingly and agressively directed to America's most competitively disadvantaged group; not to cut back as has been the experience in recent years. A number of the federal agencies used to have Indian or minority desks at regional, state and district levels which have been cut back. For example, the North Dakota SBA had an Indian individual responsible for minority business outreach and he is no longer there. We need to have these positions reinstated as they are critical to communicating with our Indian business people.

In the final analysis, Indian business development resulting in strong economies on the reservations, is probably the only legitimate long term solution to Indian American, indeed to our very survival. We encourage the U.S. Congress and our fellow Americans in making the self-determination dream a reality in Indian Country.

CONCLUDING RECOMMENDATIONS

In conclusion, I want to respond constructively to the issues addressed by my Tribe. The Turtle Mountain Band of Chippewa Indians make the following recommendations for the U.S. Congress' consideration in each of the following issue areas:

CHILD ABUSE can be alleviated by:

* Congress amending "638" regulations to allow Tribal judiciaries to apply for direct funding. The Turtle Mountain Tribal Court is prepared to be a national "model court" to test direct funding.

* A multi-faceted approach, with sufficient and non-competitive access to resources

* Expanding the Turtle Mountain reservation wide effective schools system pilot project to other Tribes throughout the United States.

TRIBAL GOVERNMENTS

* Can be improved by establishing a national training institute for tribal governments.

BUREAU OF INDIAN AFFAIRS must receive constant pressure from Congress to implement the federal government's trust responsibility. Specifically, Congress should instruct the BIA to:

* Implement the Indian Priority System equitably and not cut programs arbitrarily without prior Tribal consultation.

* Respond to the long completed investigation on the lease mismanagement on the Turtle Mountains Tribal and member lands in Montana. Specifically, how does the BIA intend to reimburse the Tribe and our members for the mismanagement of these lands some dating as far back as 40 years?

GAMING:

* While our Tribe strongly opposed P.L. 100-497, unfortunately it is now the law. Nevertheless, we recommend Congress amend the legislation to: remove previously established gaming Tribes from its authority, specifically our Tribe as it duplicates our own effective Gaming Commission and Code.

- * Leave all gross revenue with the respective Tribes.
- * If Congress insists on keeping the law, Congress should at least allocate the funds to pay for it, not assess Tribes for a percentage of the gross on one of the very few sources of Tribal revenue.

CONTRACTING can be improved by Congress:

- * Amending SBA 8(a) legislation to extend the status period beyond the current 9 year period.
- * Approving legislation to match Tribal and private funds with federal funds to endow Tribal community development foundations.
- * Investigate federal contracting procedures to assure that Indian "front" businesses are not receiving unfair competitive advantage over legitimate Indian owned businesses.
- * Review the Department of Transportation's Surface Transportation Act minority contracting goals as a national model to be applied to all federal funds flowing to states which benefit enterprise and job creation.
- * Establish one national minority business certification board which will certify legitimate Indian and other minority businesses. This certification will be acceptable to all federal agencies.
- * Review recent cutbacks of federal agencies at national, regional, district and state levels to reinstate Indian and minority outreach desks, wherever possible.

PREPARED STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

In the course of its investigation, the Special Committee has uncovered some abuses, or potential abuses, in contracting programs other than those administered by the BIA. One of these programs is the SBA's 8(a) minority set-aside program under which the SBA contracts to help procure government contracts for small and disadvantaged businesses. Although the program is not specifically designated an Indian program, as it is open to all recognized minority groups, we felt that at least a cursory review of the program in an Indian context would be instructive. First, a large number of Indian minorities participate in the program. Indeed, more federal funds are spent on contracts awarded to Indian 8(a) firms than the funds spent in all other Indian contracting programs combined. Second, the SBA's 8(a) program is run much differently from other specifically tailored Indian programs. The rules governing qualification into the program are very strict. Nevertheless, we believe that the SBA program may -- like the BIA program -- give rise to fronting arrangements.

The hearing focuses on Kinross Manufacturing Corp., an 8(a) company whose minority applicant based his minority status on his Indian ancestry. The company, and its principal government consultants, also had dealings with the Wedtech firm. The Committee has discovered certain patterns of abuses common to Kinross, Wedtech and other 8(a) companies.

Pursuant to an agreement between staff and the witness' counsel, the Committee has examined the principal witness in Executive Session. The other chief witness, whom we will hear from shortly, is Steven Marica, Assistant Inspector General for Investigations with the SBA whose office is currently investigating Kinross and other related matters.

Lastly, we will hear from Jim Elroy, an FBI agent detailed to the Committee. He will give a case history of a problem found to exist within the HUD Indian housing programs that involves the same consulting firm involved in Kinross. We examined this one aspect of HUD Indian housing in this session because of the common actors involved in the two cases. As indicated in the opening remarks, we expect to hold further hearings on this program at a later date.

I would ask that Associate Counsel Andrew Klingenstein now summarize the testimony of Richard Ramirez, from whom we heard in Executive Session.

SUMMARY OF PREPARED STATEMENT OF RICHARD RAMIREZ HELD IN EXECUTIVE SESSION ON FEBRUARY 1, 1989

The Special Committee has heard testimony, in Executive Session, from Richard Ramirez, who was head of the Small and Disadvantaged Business Utilization Program for the U.S. Department of the Navy from 1981 through 1984. He was involved in counseling a number of participants in the SBA's 8(a) program, including the Wedtech firm located in Bronx, N.Y., and Kinross Manufacturing Company.

The 8(a) program is a minority set-aside program established by the SBA to help disadvantaged minorities. Ramirez was the Navy's liaison to the 8(a) program before leaving to join the consulting firm of Gnau, Carter & Jacobsen in Washington, D.C. It was his employment at Gnau, Carter & Jacobsen to which most of his testimony relates.

Kinross is a company that manufactures munitions in the Upper Peninsula of Michigan. Kinross has been qualified under the 8(a) SBA program. Ramirez testified that Kinross may not have qualified legitimately. Ramirez described Kinross as an Indian front company controlled by wealthy businessmen, including those with connections to the Wedtech company. At least one of these businessmen took large amounts out of the Kinross company in the form of consulting fees and expenses.

Mr. Ramirez was indicted for his activities relating to two of these companies and has pled to several crimes, including conspiracy to accept a bribe in connection with the Wedtech affair. He has entered into a cooperation agreement with the federal government under which he has agreed to give testimony in a number of cases involving SBA 8(a) contractors.

Mr. Ramirez has given testimony before the Committee under compulsion and in exchange for a grant of limited immunity which provides that the testimony given today, if truthful, may not be used against him in any criminal proceeding.

The account given by Mr. Ramirez involves an interlocking web of contractors, consultants and government employees, including several of those who participated on behalf of Wedtech. These individuals duplicated the same scheme several times, with the goal of bilking the federal government (and the 8(a) program) of millions of dollars in contract awards.

Kinross Principal Allegations

Ramirez testified:

(1) that Kinross was only admitted to the 8(a) program on the strength of its political ties;

(2) that Kinross was a "front" company controlled by non-disadvantaged, wealthy individuals who were politically well-connected and traded on those connections; and

(3) that the relationship between Kinross and key government officials was unusually close; although he did not know whether any payments had been made to any U.S. government representatives.

According to Ramirez' account, the main architect of Kinross -- and the person who first suggested that it be set up to participate in the 8(a) program -- was Roy T. Jacobsen, a name partner in the firm of Gnau, Carter, & Jacobsen.

Ramirez came to learn that Jacobsen and others, through the Gnau, Carter firm, had formed Kinross, and would file an application to have Kinross admitted in the SBA's 8(a) minority set-aside program.

Ramirez stated that the plan was to use Gerry Blanchard -- who was once a driver for the Gnau, Carter firm -- as the disadvantaged minority applicant. Prior to the summer of 1982, Blanchard was not an enrolled Indian in any tribe, and to Ramirez' knowledge, had never represented himself to be an Indian. Ramirez claimed that he was constantly chiding Blanchard to prove his Indian heritage, recalling that Blanchard would laugh about his so-called Indian ancestry and was embarrassed about representing himself as an Indian to qualify for the 8(a) program.

Ramirez stated that Jacobsen and John Gnau, another partner in Gnau, Carter, recruited John McGoff to help finance the venture. Under the plan, McGoff was to hold a 39% interest in Kinross.

Ramirez testified that he understood Kinross was set up with borrowed funds -- the large majority of which came from government loans or loan guarantees. The company applied for, and received, 8(a) certification and then won multi-million government contracts. In the meantime, he stated, the company paid exorbitant fees to its political consultants like Gnau, Carter.

Ramirez testified that almost every aspect of Kinross was, at best, highly unusual. He had never seen a start-up firm supported by such a vast amount of government loans and loan guarantees. He stated that the ownership structure itself was "novel," and the fact that the firm was 100% leveraged through loans was unusual.

Ramirez called Kinross' 8(a) application "unusual" and he stated that it violated at least three major SBA rules, any one of which, he said, in his experience, normally would have disqualified an applicant from participation in the program. Ramirez claimed that Kinross used its close political ties and political pressure to ram the application through SBA, even over the objections of SBA's local office and several SBA regional office staff members.

The contract was approved by the regional office due to the support of Regional Administrator Richard Durkin, even though the local SBA office voiced its strong opposition. Ramirez said he was a party to a telephone call made by Durkin to Jacobsen one early evening at the Maison Blanche restaurant, during which Durkin asked Jacobsen to make "the case" for SBA's waivers of guideline violations to Durkin's staff, who were also on the line. Ramirez testified that he thought the call had been pre-scheduled and that Durkin had told Jacobsen that Durkin had to make the approval look hard for my staff.

Political pressure was also exerted, according to Ramirez, to convince SBA headquarters to grant the application. He testified that Robert Saldivar -- the SBA's number two official in charge of the 8(a) program and the one that actually signed Kinross' certification letter -- had told him words to the effect that he "did not know how the application had even [reached the SBA headquarters] or how he would approve it, but that there was great pressure" to do so. Ramirez himself said he spoke with SBA official Saldivar about the applications on two or three occasions.

Additionally, Ramirez also testified to what, in his view, was McGoff's and, to a lesser extent, Jacobsen's control of Kinross. Ramirez stated that the control over Blanchard -- exerted mainly through McGoff's significant ownership in the company, his ties to the financial community, and his outside management team -- should have prevented Kinross from being admitted into the program.

U.S. Small Business Administration
Washington, D.C. 20416

**OFFICE OF THE
INSPECTOR GENERAL**

APR 4 1989

Honorable Dennis DeConcini
Chairman
Special Committee on Investigations
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510-6450

Dear Mr. Chairman:

This is in response to your letter dated March 6, 1989, in which you requested my views on certain issues related to this Agency's 8(a) program.

Efforts of my Office to enforce the 8(a) program and its regulations are in two general categories -- investigations and audits. We have aggressively investigated 8(a) irregularities to achieve a deterrent effect; as a result, in the last three years, we increased our 8(a) caseload from 16 to 53. Concomitantly, indictments and convictions have increased dramatically. For example, in FY 1988, 21 indictments were returned on 8(a) matters which was 58% of our total for that year. In the same year, 12 convictions, or 43% of the total, were 8(a) related. My investigators also are actively engaged, along with program officials, in educating employees as to the indicators of public corruption they may encounter in Agency programs. On the audit side, we have recently completed three audits of 8(a) firms and are presently conducting another. Also, we are performing an internal audit of the Agency 8(a) requirements function, i.e., the process of matching government contracts with 8(a) contractors.

Our audit and investigation efforts have been constrained only by our ability to devote resources to the 8(a) program. In this regard, we have, amongst other things, been working with the Small Business Committees to change requirements for the examination of Small Business Investment Companies so that we will have more flexibility in shifting audit resources to more effectively respond to ever changing priorities. The 100th Congress helped us by changing the requirement for an annual to a biennial examination; this has allowed us to devote some additional resources to the 8(a) program. We will continue to work with the Committees and trust that, as we gain their confidence, we will be able to exercise greater discretion in the deployment of available resources where ever there may be priority needs. In addition, recently we analyzed our completed 8(a) investigations to determine trends and trouble spots in an effort to improve the way we do business.

The problems encountered by our office in dealing with the 8(a) program flow from the fact that the uniqueness of the program may make it more susceptible to fraud. For example, one aspect of the program is that it is based on the status of the individual and this provides the opportunity to establish a front operation by qualifying a person as the majority owner of a business. Once established, the business has the opportunity to obtain sole source government contracts. To compound the problem, fronts, as one might expect, are most often created in a sophisticated manner so that their existence is extremely difficult and time consuming to prove. Another problem centers about the failure of agency employees to adhere to agency directives when making programatic decisions. This has resulted in cases being declined for prosecution. We are working with management to lessen such occurrences.

Please advise me if I may further assist the Committee in any manner.

Sincerely,

Charles R. Gillum
Inspector General